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**RE: Community Reinvestment Act Proposed Rulemaking [87 FR 33884]**

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Federal Reserve: 12 CFR Part 228; Regulation BB Docket No. R-1769; RIN 7100-AG29

FDIC: 12 CFR Part 345; RIN 3064-AF81

To Whom it May Concern:

Thank you for this opportunity to comment on proposed amendments to implementing regulations for the Community Reinvestment Act of 1977 (the CRA), and for coming together as enforcement agencies to issue a joint Notice of Proposed Rulemaking (NPR).

I am President of Calvin Bradford & Associates, Ltd. I worked on the original CRA proposals and legislation and there is no doubt that the CRA was intended to counteract racial redlining. I have worked for over 40 years on CRA and fair housing issues, been an expert in over forty fair housing cases, filed CRA challenges, and worked on developing and evaluating CRA programs. While the CRA has been the law for 35 years, the prudential regulatory agencies have never established a credible assessment process for the consideration of race discrimination in the CRA examinations and ratings. There are many important issues and complicated evaluation metrics contained in this NPR, but this comment is addressed specifically at the need to incorporate the consideration of race directly within the evaluation of the bank's assessment area(s), in each of the tests, in the development and evaluation of strategic plans, and as the final consideration before assigning a rating.

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## **Part One**

### **The Existing Legal Authority Related to the Affirmative Obligation of the Prudential Regulatory Agencies to Incorporate Race into the CRA Examination Process**

The position of this section of the comment is that existing laws and the implementing regulations for the Community Reinvestment Act (CRA) require the consideration of race in the examination process. The purpose of this section is to document that there is an affirmative legal obligation for the prudential Federal regulators (the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board) to incorporate racial analyses as part of the examination procedures for the Community Reinvestment Act.

#### **Part One Summary**

Some have put forth the spurious argument that because the text of the Act does not specifically identify the consideration of “race” that such an analysis should not be part of the examination process.<sup>1</sup> This review shows that the prudential regulatory agencies have been singled out for decades under the Fair Housing Act (FHA) with an affirmative obligation to protect racial groups and areas as well as the other protected classes from discrimination in the mortgage markets. Moreover, after 1974, these agencies have been responsible for protecting the racial groups and the other protected classes under the Equal Credit Opportunity Act (ECOA) which covers all aspects of credit practices including both personal and business transactions.

The prudential regulators recognize the CRA as part of a battery of civil rights laws designed to combat discrimination. The CRA regulations (both existing and as proposed under the May 5, 2022, Notice Proposed Rulemaking [NPR] by the Federal Reserve Board [Fed], the Office of the Comptroller of the Currency [OCC], and the Federal Deposit Insurance Corporation [FDIC]) create a special section in the CRA examination process to consider evidence of discrimination and other illegal acts before assigning a rating for an examination. Therefore, the prudential regulatory agencies have the clear legal authority and the affirmative obligation to consider race in the CRA examination process.

The prudential regulatory agencies have long established fair lending examination procedures to identify discrimination. The examination procedures cover a wide range of practices including geographic racial redlining, as well as discrimination in access to financial products and services.

Any omission of the consideration of race is due to a failure on the part of the regulators to fulfill their legal obligations in oversight and enforcement of the Fair Housing Act, the Equal

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<sup>1</sup> Here and in all other references, “race” includes both race and ethnicity.



Credit Opportunity Act and the Community Reinvestment Act. The sections of this comment trace these legal requirements and enforcement mechanisms in the CRA process from the passage of the Fair Housing Act to the current time.

### **The Prudential Regulators Recognize the CRA as Part of a Battery of Civil Rights Laws**

The Notice of Proposed Rulemaking related to the CRA released jointly by the Fed, the OCC, and the FDIC, contains the following statement with the heading “CRA, Illegal Discrimination, and Fair Lending” under Part D of the Introduction:

The CRA was one of several laws enacted in the 1960s and 1970s to address fairness and financial inclusion in access to housing and credit. During this period, Congress passed the Fair Housing Act (FHA) in 1968, to prohibit discrimination in renting or buying a home, and the Equal Credit Opportunity Act (ECOA) in 1974 (amended in 1976), to prohibit creditors from discriminating against an applicant in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age. **These fair lending laws provide the legal basis for prohibiting discriminatory lending practices based on race and ethnicity.** (emphasis added)

Both the NPR released by the Fed on September 21, 2020, and the current joint NPR follow this paragraph with references to the development of the CRA within the context of the sibling civil rights laws. The comments from the 2020 Fed NPR are more extensive and serve as the basis of the section below.

Quoting Governor Lael Brainard, the 2020 NPR states that “the CRA was one of several landmark pieces of legislation enacted in the wake of the civil rights movement intended to address inequities in the credit markets”.<sup>2</sup> The NPR states that, “In particular, the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA) fair lending laws each include an explicit focus on discrimination on prohibited bases such as race, and the Home Mortgage Disclosure Act (HMDA) is intended to bring greater transparency to mortgage lending practices”.

A quotation in the NPR from Chairman Bernanke concerning the history of the CRA states that:

Public and congressional concerns about the deteriorating condition of America’s cities, particularly lower-income and **minority neighborhoods**, led to the enactment of the Community Reinvestment Act. . . . Several social and economic factors help explain why credit to lower-income neighborhoods was limited at that time. First, **racial**

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<sup>2</sup> “Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose” (Jan. 8, 2020), <https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm>).

**discrimination in lending undoubtedly adversely affected local communities. Discriminatory lending practices had deep historical roots.**<sup>3</sup> (emphasis added)

According to the Board’s language in the 2020 NPR:

**Congress enacted the CRA in 1977 primarily to address economic challenges in predominantly minority urban neighborhoods that had suffered from decades of disinvestment and other inequities.** Many believed that systemic inequities in credit access – due in large part to a practice known as “redlining” – along with a lack of public and private investment, was at the root of these communities’ economic distress. **Redlining occurred when banks refused outright to make loans or extend other financial services in neighborhoods comprised largely of African-American and other minority individuals, leading to discrimination in access to credit and less favorable financial outcomes even when they presented the same credit risk as others residing outside of those neighborhoods.** The term is widely associated with the former federal Home Owners’ Loan Corporation (HOLC), which employed color-coded maps to designate its perception of the relative risk of lending in a range of neighborhoods, with “hazardous” (the highest risk) areas coded in red. **Redlined neighborhoods typically had a high percentage of minority residents, were overwhelmingly poor, and had less desirable housing** (referencing a paper from the Federal Reserve Bank of Chicago).<sup>4</sup> (emphasis added)

The footnote for that paper provides the following additional quote:

Neighborhoods were classified based on detailed risk-based characteristics, including housing age, quality, occupancy, and prices. However, non-housing attributes such as race, ethnicity, and immigration status were influential factors as well. **Since the lowest rated neighborhoods were drawn in red and often had the vast majority of African American residents, these maps have been associated with the so-called practice of “redlining” in which borrowers are denied access to credit due to the demographic composition of their neighborhood.**<sup>5</sup> (emphasis added)

The 2020 NPR states that:

The CRA invests the Board, the FDIC, and the OCC with broad authority and responsibility for implementing the statute, which provides the agencies with a crucial mechanism for addressing persistent systemic inequity in the financial system for LMI

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<sup>3</sup> Chairman Ben S. Bernanke, Board of Governors of the Federal Reserve System, “The Community Reinvestment Act: Its Evolution and New Challenges” (March 30, 2007), <https://www.federalreserve.gov/newsevents/speech/Bernanke20070330a.htm>.

<sup>4</sup> Daniel Aaronson, Daniel Hartley, and Bhashkar Mazumder, Federal Reserve Bank of Chicago, “The Effects of the 1930s HOLC ‘Redlining’ Map” (Feb. 2019), <https://www.chicagofed.org/publications/working-papers/2017/wp2017-12>.

<sup>5</sup> Ibid.

and **minority** individuals and communities. **In particular, the statute and its implementing regulations provide the agencies, regulated banks, and community organizations with the necessary framework to facilitate and support a vital financial ecosystem that supports LMI and minority access to credit and community development.** (Emphasis added; the statement is accompanied by a reference to Chairman Bernanke's speech cited for the quote above.)

However, the NPR also states that:

Even with the implementation of the CRA and the other complementary laws, the harmful legacy of redlining and other discriminatory practices too often continues to be felt. In 2016, the “wealth gap [was] roughly the same as it was in 1962, two years before the passage of the Civil Rights Act of 1964[.]”<sup>6</sup> The NPR also references an article from the *New York Times* that “The black-white gap in homeownership in America has in fact changed little over the last century . . . . That pattern helps explain why, as the income gap between the two groups has persisted, the wealth gap has widened by much more.”<sup>7</sup>

Finally, a further citation to Governor Brainard states that, “the central thrust of the CRA is to encourage banks to ensure that all creditworthy borrowers have fair access to credit, and, to do so successfully, **it has long been recognized that they must guard against discriminatory or unfair and deceptive lending practices.**”<sup>8</sup> (emphasis added)

Therefore, the entire background section of the NPR places the CRA among the nation's critical civil rights laws and the current NPR also places it within the bundle of civil rights laws. The support for this lineage is supported by quotations from former Chairman Bernanke, Governors of the Federal Reserve Board, and numerous research papers from Federal Reserve Banks with specific references to race discrimination.

**If the CRA is part of the body of Federal civil rights legislation, then it must include a clear focus on one or more of the classes protected by the civil rights laws. Therefore, the Board cannot seriously place the CRA among the major civil rights laws and eliminate any formal metric focused on actual protected class characteristics.**

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<sup>6</sup> Dionissi Aliprantis and Daniel Carroll, Federal Reserve Bank of Cleveland, “What is Behind the Persistence of the Racial Wealth Gap” (Feb. 28, 2019), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap.aspx>.

<sup>7</sup> *The New York Times*, “How Redlining's Racist Effects Lasted for Decades” (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasting-for-decades.html> (citing William J. Collins and Robert A. Margo, “Race and Home Ownership from the End of the Civil War to the Present” (Nov. 2010).

<sup>8</sup> Governor Lael Brainard, “Strengthening the Community Reinvestment Act: What are We Learning?” (Feb. 1, 2019), <https://www.federalreserve.gov/newsevents/speech/brainard20190201a.htm>.

**Sibling Federal Nondiscrimination Laws under Which the Prudential Regulators Have Existing Enforcement Obligations Related to Race**

*Protected Classes under the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA)*

The Equal Credit Opportunity Act of 1974 (ECOA) and the Fair Housing Act of 1968 (FHA) as amended define specific protected classes. While we are focused on the affirmative obligation of the prudential regulatory agencies to enforce the FHA, it is important to note that the FHA is one of a battery of civil rights laws and that, in terms of credit-related housing transactions, citizens are protected against discrimination by both ECOA and the FHA.<sup>9</sup>

ECOA prohibits discrimination based on:

- Race or color
- Religion
- National origin
- Sex
- Marital status
- Age (provided the applicant has the capacity to contract)
- The applicant's receipt of income derived from any public assistance program
- The applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act.

The FHA prohibits discrimination in housing related transactions based on:

- Race or color
- National origin
- Religion
- Sex
- Familial status (defined as children under the age of 18 living with a parent or legal custodian, pregnant women, and people securing custody of children under 18)
- Handicap status.

**Therefore, in order to enforce ECOA and the FHA, bank examiners must directly consider these protected class characteristics, including race.**

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<sup>9</sup> With some limitations, the Civil Rights Act of 1866 (14 United States Statutes at Large 27-30, enacted April 9, 1866, reenacted 1870) prohibited discrimination against a natural born citizen's rights to "purchase, lease, sell, hold, and convey real and personal property" due to that person's "color or race". The Act set out lengthy sections for enforcement including by any agents of the President, though this predates the post-Depression prudential regulatory agencies' oversight of depository institutions.

## **Affirmative FHA Enforcement Requirements for the Prudential Regulatory Agencies**

### *Affirmative Obligations Written into the Fair Housing Act*

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619) declares that it is “the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>10</sup> “Accordingly, the Fair Housing Act prohibits, among other things, discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions because of “race, color, religion, sex, familial status, national origin, or handicap.”<sup>11</sup>

Section 808(d) of the Fair Housing Act [42 U.S.C. §3608 ((d)] states that:

*all executive departments and agencies shall administer their programs and activities relating to housing and urban development **(including any Federal agency having regulatory or supervisory authority over financial institutions)** in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes. (emphasis added)*

The section highlighted in boldface specifically places this affirmative requirement on the prudential regulatory agencies. This insertion was added in the 1988 amendments to the Act. The original text of the Act already placed “all executive departments and agencies” under an affirmative obligation to enforce the FHA. Therefore, the parenthetical insertion is redundant and was clearly intended to make it absolutely clear how to interpret the section and who is subject to the provision. Thus, the obligation for the prudential regulatory agencies to affirmatively further the fair housing act through their oversight and enforcement activities was mandated by Congressional intent and codified in the law - **twice**.

This affirmative obligation existed six years before ECOA and nine years before the CRA. As a provision of Federal law, there was no legal reason to add to the CRA another redundant provision identifying this obligation. Obviously, **the prudential regulators cannot administer the Fair Housing Act affirmatively, or at all, without the direct consideration of race in their examination and oversight of the regulated institutions**. Neither can they carry out their obligations to enforce the Equal Credit Opportunity Act without the consideration of ECOA’s protected classes, including race.

### *Executive Order 11063*

Executive Order 11063 from President John Kennedy in 1962 requires all executive agencies to operate their programs affirmatively to eliminate discrimination in all aspects of

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<sup>10</sup> See, 42 U.S.C. 3601.

<sup>11</sup> See, 42 U.S.C. 3604 and 3605.

housing and development related to activities supported by Federal programs, guarantees, insurance, etc. This obligation related to federal programs predates the Fair Housing Act and the Equal Credit Opportunity Act.

*Executive Order 12892*

Executive Order 12892 issued by President Clinton on January 20, 1994, (upon taking office) employs yet a different means to once again reiterate the affirmative obligation on all executive agencies – including the financial regulatory agencies – to affirmatively further the Fair Housing Act. This links the enforcement of the Fair Housing Act **affirmatively** to the regulatory operations of the financial regulators by citing the precise language of the Fair Housing Act (highlighted in boldface below). Section 1 of this Order reads:

*LEADERSHIP AND COORDINATION OF FAIR HOUSING IN FEDERAL PROGRAMS:  
AFFIRMATIVELY FURTHERING FAIR HOUSING*

*By the authority vested in me as President by the Constitution and the laws of the United States of America, and in accordance with the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.) (Act), in order to affirmatively further fair housing in all Federal programs and activities relating to housing and urban development throughout the United States, it is hereby ordered as follows:*

*Section 1. Administration of Programs and Activities Relating to Housing and Urban Development. 1-101.*

*Section 808(d) of the Act, as amended, provides that all executive departments and agencies shall administer their programs and activities relating to housing and urban development (**including any Federal agency having regulatory or supervisory authority over financial institutions**) in a manner affirmatively to further the purposes of the Act and shall cooperate with the Secretary of Housing and Urban Development to further such purposes. 1-102. As used in this order, the phrase programs and activities shall include programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions).*

At this point in time, while the regulatory agencies were busy rewriting the CRA regulations, the obligation of these agencies to specifically consider race and discrimination had been codified in the Fair Housing Act of 1968, emphasized by the 1988 amendments to the Act and imposed yet a third time in Executive Order 12892.

## **The Fair Lending Examination Procedures of the Prudential Regulatory Agencies**

### *Interagency Fair Lending Examination Procedures from the Federal Financial Institutions Examination Council (FFIEC)<sup>12</sup>*

It is not as if the prudential regulatory agencies need to invent some way to consider race in their CRA exams. The existing **FFIEC Interagency Fair Lending Examination Procedures** define the protected classes under ECOA and the FHA and then prescribe the methods to be used to detect violations of these acts. All of the prudential regulatory agencies engage in examining their covered institutions for compliance with these fair lending laws.<sup>13</sup> As is clear in the citations below, this already commits these regulatory agencies to the specific consideration of race and other protected classes in a detailed examination process. If done properly and thoroughly, these exams should provide the regulatory agencies with evidence of discriminatory behavior in themselves.

The guide begins with a statement on the protected classes and then several background statements including:

*Under the ECOA, it is unlawful for a lender to discriminate on a prohibited basis in any aspect of a credit transaction, and under both the ECOA and the FHAct, it is unlawful for a lender to discriminate on a prohibited basis in a residential real-estate-related transaction. Under one or both of these laws, a lender may not, because of a prohibited factor*

- *Fail to provide information or services or provide different information or services regarding any aspect of the lending process, including credit availability, application procedures, or lending standards*
- *Discourage or selectively encourage applicants with respect to inquiries about or applications for credit*
- *Refuse to extend credit or use different standards in determining whether to extend credit*

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<sup>12</sup> This examination manual was issued in August of 2009. At that time, it included the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the National Credit Union Administration, and the Office of Thrift Supervision (which has subsequently been eliminated). The procedures are still in effect.

<sup>13</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 gave the Consumer Financial Protection Bureau (CFPB) the responsibility of examining the largest banks (those with over \$10 billion in assets) for compliance with 14 consumer laws, including ECOA. The **CFPB Supervision and Examination Manual** provides the following statement related to fair lending examinations at the beginning of the section on ECOA (at page 833 of the PDF version last updated in February 2022):

*For fair lending scoping and examination procedures, the CFPB is temporarily adopting the FFIEC Interagency Fair Lending Examination Procedures that are referenced in the examination program. However, in applying those procedures the CFPB takes into account that the Fair Housing Act (FHAct), 42 U.S.C. 3601 et seq., unlike ECOA, is not a “Federal consumer financial law” as defined by the Dodd-Frank Act for which the CFPB has supervisory authority.*

- *Vary the terms of credit offered, including the amount, interest rate, duration, or type of loan*
- *Use different standards to evaluate collateral*
- *Treat a borrower differently in servicing a loan or invoking default remedies*
- *Use different standards for pooling or packaging a loan in the secondary market.*

*A lender may not express, orally or in writing, a preference based on prohibited factors or indicate that it will treat applicants differently on a prohibited basis. A violation may still exist even if a lender treated applicants equally. (at page ii)*

The guide also adds that:

*A lender may not discriminate on a prohibited basis because of the characteristics of ...the present or prospective occupants of either the property to be financed or the characteristics of the neighborhood or other area where property to be financed is located. (at page ii)*

The examination procedures require the comparison of protected and non-protected classes within a broad range of banking practices as listed in the Table of Contents for the guide shown below:

<b>PART III - EXAMINATION PROCEDURES</b>	<b>17</b>
A. Verify Accuracy of Data	17
B. Documenting Overt Evidence of Disparate Treatment	17
C. Transactional Underwriting Analysis - Residential and Consumer Loans	18
D. Analyzing Potential Disparities in Pricing and Other Terms and Conditions	22
E. Steering Analysis	24
F. Transactional Underwriting Analysis - Commercial Loans	27
G. Analysis of Potential Discriminatory “Redlining”	29
H. Analysis of Potential Discriminatory Marketing Practices	38
I. Credit Scoring	40
J. Disparate Impact Issues	40

### **The FFIEC Specific Examination Guidelines Related to Racial Redlining:**

Each procedure is defined by specific activities. For example, **under the section on “redlining”, these activities indicate how this issue involves a broad range of activities and not simply the exclusion of minority areas from the service area.** The exam procedures identify 12 potential indicators of redlining that need to be reviewed in the examination. As reproduced below, each factor contains a reference to differences in products, services, or treatment specifically related to high concentrations of minorities:<sup>14</sup>

<sup>14</sup> The guide identifies each redlining risk factor with an “R” and the guide contains the following note: “For risk factors below that are marked with an asterisk (\*), examiners need not attempt to calculate the indicated ratios for



*R1. \*Significant differences, as revealed in HMDA data, in the number of applications received, withdrawn, approved not accepted, and closed for incompleteness or loans originated in those areas in the institution's market that have relatively high concentrations of minority group residents compared with areas with relatively low concentrations of minority residents.*

*R2. \*Significant differences between approval/denial rates for all applicants (minority and non-minority) in areas with relatively high concentrations of minority group residents compared with areas with relatively low concentrations of minority residents.*

*R3. \*Significant differences between denial rates based on insufficient collateral for applicants from areas with relatively high concentrations of minority residents and those areas with relatively low concentrations of minority residents.*

*R4. \* Significant differences in the number of originations of higher-priced loans or loans with potentially negative consequences for borrowers, (i.e., non-traditional mortgages, prepayment penalties, lack of escrow requirements) in areas with relatively high concentrations of minority residents compared with areas with relatively low concentrations of minority residents.*

*R5. Other patterns of lending identified during the most recent CRA examination that differ by the concentration of minority residents.*

*R6. Explicit demarcation of credit product markets that excludes MSAs, political subdivisions, census tracts, or other geographic areas within the institution's lending market or CRA assessment areas and having relatively high concentrations of minority residents.*

***R7. Difference in services available or hours of operation at branch offices located in areas with concentrations of minority residents when compared to branch offices located in areas with concentrations of non-minority residents.***

*R8. Policies on receipt and processing of applications, pricing, conditions, or appraisals and valuation, or on any other aspect of providing residential credit that vary between areas with relatively high concentrations of minority residents and those areas with relatively low concentrations of minority residents.*

***R9. The institution's CRA assessment area appears to have been drawn to exclude areas with relatively high concentrations of minority residents.***

*R10. Employee statements that reflect an aversion to doing business in areas with relatively high concentrations of minority residents.*

***R11. Complaints or other allegations by consumers or community representatives that the institution excludes or restricts access to credit for areas with relatively high concentrations of minority residents. Examiners should review complaints against the institution filed either with their agency or the institution; the CRA public comment file; community contact forms; and the responses to questions about redlining, discrimination, and discouragement of applications, and about meeting the needs of racial or national origin minorities, asked as part of obtaining local perspectives on the performance of financial institutions during prior CRA examinations.***

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racial or national origin characteristics when the institution is not a HMDA reporter. However, consideration should be given in such cases to whether or not such calculations should be made based on gender or racial-ethnic surrogates.”

***R12. An institution that has most of its branches in predominantly non-minority neighborhoods at the same time that the institution's sub-prime mortgage subsidiary has branches which are located primarily in predominantly minority neighborhoods.*** (at pages 10-11 – emphasis added for factors related to consumer complaints and differences in banking services)

*Examples from the Comptroller's (OCC) Handbook for Fair Lending Examinations<sup>15</sup>*

The examination handbooks for each regulatory agency essentially mirror or repeat the interagency procedures. Below are examples from the procedures for the Comptroller of the Currency. The outline for conducting a fair lending examination from the **Comptroller's Handbook for Fair Lending** compliance indicates how **race is specifically to be investigated both in the treatment and impacts on individuals of different races and in terms of geographic discrimination in terms of the many facets of “redlining”**:

The Table of Contents for the **Handbook** is essentially the same as that in the interagency procedures:<sup>16</sup>

<b>Examination Procedures for Assessing Fair Lending Performance</b>	<b>37</b>
OBJECTIVE: VERIFY ACCURACY OF DATA	37
OBJECTIVE: DOCUMENT REGULATION B COMPLIANCE CHECKLISTS	37
OBJECTIVE: CONDUCT AN UNDERWRITER INTERVIEW	38
OBJECTIVE: DOCUMENT OVERT EVIDENCE OF DISPARATE TREATMENT	39
OBJECTIVE: CONDUCT TRANSACTIONAL UNDERWRITING ANALYSIS – RESIDENTIAL AND CONSUMER LOANS	40
OBJECTIVE: ANALYZE POTENTIAL DISPARITIES IN PRICING AND OTHER TERMS AND CONDITIONS	46
OBJECTIVE: EVALUATE POTENTIAL FOR DISCRIMINATORY STEERING	48
OBJECTIVE: CONDUCT TRANSACTIONAL UNDERWRITING ANALYSIS — COMMERCIAL LOANS	53
OBJECTIVE: DETERMINE POTENTIAL FOR DISCRIMINATORY “REDLINING”	56
OBJECTIVE: DETERMINE POTENTIAL FOR DISCRIMINATORY MARKETING PRACTICES	67
OBJECTIVE: CONSIDER THE EFFECT OF CREDIT SCORING	69
OBJECTIVE: CONSIDER DISPARATE IMPACT ISSUES	69

<sup>15</sup> See Federal Deposit Insurance Corporation, **FDIC Consumer Compliance Examination Manual – Part IV Fair Lending**, March 2021, for comparable procedures for the FDIC. The Federal Reserve Board uses training and tools that are based on the **FFIEC Interagency Fair Lending Procedures**.

<sup>16</sup> Office of the Comptroller of the Currency, **Fair Lending, Comptroller's Handbook**, January 2010 (notes on the handbook indicate updates past 2010).

## The OCC Specific Examination Guidelines Related to Racial Redlining:

The section on Redlining repeats the 12 potential indicators of redlining contained at pages 29-31 of the interagency procedures. Also repeating language from the interagency procedures, the **Handbook** states:

*Neither the Equal Credit Opportunity Act (ECOA) nor the Fair Housing Act (FHA) specifically uses the term “redlining.” However, federal courts as well as agencies that have enforcement responsibilities for the FHA have interpreted redlining as prohibiting a bank from having different marketing or lending practices for certain geographic areas, compared with others, when the purpose or effect of such differences would be to discriminate on a prohibited basis. Similarly, the ECOA would prohibit treating applicants for credit differently on the basis of differences in the racial or ethnic composition of their respective neighborhoods. (at page 56).*

Continuing with comparable language from the interagency procedures the **Handbook** describes redlining in the following language:

*Traditional “redlining” is a form of illegal disparate treatment in which a bank provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area in which the credit seeker resides or will reside or in which the residential property to be mortgaged is located. The practice of targeting certain applicants or areas with less advantageous products or services based on prohibited characteristics may also constitute redlining.<sup>17</sup>*

*The redlining analysis may be applied to determine whether, on a prohibited basis:*

- *A bank fails or refuses to extend credit in such an area;*
- *A bank targets certain borrowers or certain areas with less advantageous products;*
- *A bank makes loans in such an area but at a restricted level or upon less-favorable terms or conditions as compared with contrasting areas; or*
- *A bank omits or excludes such an area from efforts to market residential loans or solicit customers for residential credit. (at page 56)*

In describing the redlining analysis to be undertaking in an examination, the **Handbook** states:

*Overt evidence is relatively uncommon. Consequently, the redlining analysis usually will focus on comparative evidence (similar to analyses of possible disparate treatment of individual customers) in which the bank’s treatment of areas with contrasting racial or national origin characters is compared. (at page 57)*

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<sup>17</sup> In the **FFIEC Interagency Fair Lending Examinations Procedures**, this sentence is replaced with “Redlining may also include “reverse redlining,” the practice of targeting certain borrowers or areas with less advantageous products or services based on prohibited characteristics.” (at page 30).

Then the **Handbook** defines six steps to be taken in an analysis to consider racial redlining:

- *Identify and delineate any areas within the bank's CRA assessment area and reasonably expected market area for residential products that have a racial or national origin group character;*
- *Determine whether any area identified in step 1 appears to be excluded, underserved, selectively excluded from marketing efforts, or otherwise less-favorably treated in any way by the bank;*
- *Identify and delineate any areas within the bank's CRA assessment area and reasonably expected market area for residential products that are of a particular racial or national origin group character and that the bank appears to treat more favorably;*
- *Identify the location of any racial or national origin group areas located just outside the bank's CRA assessment area(s) and reasonably expected market area for residential products that may have been purposely excluded by the bank;*
- *Obtain the bank's explanation for the potential difference in treatment between the areas and evaluate whether it is credible and reasonable; and*
- *Obtain and evaluate other information that may support or contradict interpreting identified disparities to be the result of intentional illegal discrimination. (at page 57-58)*

These are the same steps that are defined in the interagency procedures. Under these procedures the fair lending examination specifically reviews the CRA assessment area for indications that it excludes areas of high minority concentrations (highlighted in boldface as factor R9 in the citation from the interagency procedures above). Moreover, the fair lending examination specifically reviews the locations and services provided through bank branches related to minority and white areas (highlighted in boldface as factors R7 and R12 in the citation from the interagency procedures above). In addition to the evidence gathered directly by the examiners from the bank, the procedures include the consideration of complaints from consumers and others as part of the review process (highlighted in boldface as factor R11 in the citation from the interagency procedures above).

**None of these steps can be completed without the direct consideration of race. Indeed, the Handbook continues with specific instructions on how to identify racial concentrations for comparison just as the prior sections of the Handbook identify how to compare lending activities related to individuals based on protected and non-protected class characteristics.**

### **Citations from the CRA and Regulations**

From the citations above it is clear that there is no legal need to place the consideration of race or any other protected class under the fair lending laws directly in the CRA as existing law and current fair lending examination procedures already incorporate the consideration of race into the oversight and enforcement obligations of the prudential regulatory agencies.

The CRA added the following purpose to the responsibilities of the regulatory agencies:

*§2901. Congressional findings and statement of purpose*

- *The Congress finds that—*
  - *regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business;*
  - *the convenience and needs of communities include the need for credit services as well as deposit services; and*
  - *regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.*
- *It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.*

The Act makes the following statement concerning the examination process:

*§2903. Financial institutions; evaluation*

*(a) In general*

*In connection with its examination of a financial institution, the appropriate Federal financial supervisory agency shall—*

- (1) assess the institution's record of meeting **the credit needs of its entire community**, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution; and*
- (2) take such record into account in its evaluation of an application for a deposit facility by such institution.<sup>18</sup> (emphasis added)*

The highlighted text indicates that the covered institution must serve “its entire community”. The Act adds the need to consider “low- and moderate-income neighborhoods” as an additional class that is not protected under the existing fair lending laws but is only protected under the CRA. Therefore, unlike the consideration of race, the consideration of credit and banking services to these areas needed to be placed directly in the text of the law, in the regulations, and, in the examination procedures.

There have been two major versions of the CRA regulations, the original set in 1978 and a major revision in 1995.<sup>19</sup> These two versions have different structures and differences in the approach for evaluating performance. The original regulations focused heavily on processes,

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<sup>18</sup> 95-128, 91 Stat. 1147, Title VIII of the Housing and Community Development Act of 1977, 12 U.S.C. The language in both citations has remained unchanged through all amendments to the Act.

<sup>19</sup> Additional revisions were made in 2005 but they do not materially affect the issues in this comment. For these revisions, see, **Federal Register**: August 2, 2005 (Volume 70, Number 147), pages 44256-44270.

such as the assessment of the needs of the assessment area(s), the involvement of the board of directors, and the development of products designed to serve the identified needs of the assessment areas. The revised regulations sought to develop relatively uniform metrics for evaluating performance in three areas: lending, services, and investments. In spite of what may seem like fundamental differences, however, the consideration of race is embedded in each set of regulations. In both sets of regulations, the delineation of the assessment area (defined as a bank's "community") is a fundamental aspect of the examination process.

*Assessment Factors from the Original 1978 Regulations Include the Specific Consideration of Discrimination*

The 1978 regulations define the assessment area in terms of options for incorporating entire political areas such as metropolitan areas or counties, or in terms of arcs drawn from the bank's offices to the edge of its effective lending territory and all areas equidistant from these points. The concept was to ensure that no areas were excluded arbitrarily. In the original regulations there were twelve assessment factors. These included the following five factors:

- (b) The extent of the bank's marketing and special credit-related programs to make members of the community aware of the credit services offered by the bank;
- (d) Any practices intended to discourage applications for types of credit set forth in the bank's CRA statement(s);
- (e) The geographic distribution of the bank's credit extensions, credit applications, and credit denials;
- (f) Evidence of prohibited discriminatory or other illegal credit practices; and,
- (g) The bank's record of opening and closing offices and providing services at offices.<sup>20</sup>

In April of 1990, after the Act was amended to provide for a public version of the evaluation of each institution, the FFIEC produced the **Interagency Guidelines for Disclosure of Written Evaluations**.<sup>21</sup> This included an example of how such written public evaluations would be written for banks receiving different ratings.

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<sup>20</sup> The initial regulations for the CRA were published in the **Federal Register** October 2, 1978 (Volume 43, No. 198), at pages 47143 to 47155. Each regulatory agency had its own set of regulations, but they are identical aside from technical references to each agency. Excerpts are taken from the version for the Comptroller of the Currency (12 CFR Part 25).

<sup>21</sup> The CRA was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) to require a form of the examination to be disclosed to the public. The excerpts are taken from a copy of the guide reproduced as Appendix D-1 of **The Community Reinvestment Act (CRA) Handbook**, 1991 Fourth and Revised Edition, by the National Training and Information Center (the research arm of National People's Action) for use by community groups in developing reinvestment programs to counter redlining and disinvestment.

### Examples of Noncompliance Related to Discrimination:

The excerpts below from the example for a bank receiving a Substantial Noncompliance rating indicate how the assessment for the five factors noted above would be cited. **In as much as it is illegal to exclude minority areas from the assessment area, the failure to serve “all segments” of a bank’s community includes all minority areas that are required to be included in the assessment area.** Therefore, the excerpts from the sample evaluation indicate how all areas, including areas of minority concentrations and all the residents and businesses within these areas, were considered in the examination process:

Under “Marketing and Types of Credit Offered and Extended” the sample reads:

Assessment Factor B (at page 40)

*The institution’s marketing and advertising programs, if existent, are inadequate as they do not address the credit products directed to **all segments** of the institution’s local community, including low- and moderate-income neighborhoods. (emphasis added)*

Under “Reasonableness of the Delineated Community” (at page 44) the example text reads:

*The institution’s delineated community is unreasonable and excludes low- and moderate-income neighborhoods. Institution’s guidelines for defining its community need substantial revision.*

Assessment Factor E

*The geographic distribution of the institution’s credit extensions, applications, and denials does, in fact, indicate unreasonable lending patterns inside and outside its delineated community, particularly in low- and moderate-income communities.*

Assessment Factor G

*There is limited accessibility to the institution’s offices for certain segments of its local community, particularly low- and moderate-income neighborhoods.*

Under “Discrimination and Other Illegal Credit Practices”, the sample text reads:

Assessment Factor D (at page 47)

*Available data indicate that the institution rarely, if ever, considers credit applications from **all segments of its local community**. The volume of applications from low- and moderate-income neighborhoods is very low or non-existent. (emphasis added)*

Assessment Factor F (at page 48)

*The institution is in substantial noncompliance with antidiscrimination laws and regulations including: the Equal Credit Opportunity Act, the Fair Housing Act, the Home Mortgage Disclosure Act, and any agency regulations pertaining to nondiscriminatory treatment of credit applicants.*

*The institution has demonstrated a pattern or practice of prohibited discrimination, or has committed a large number of substantive violations of the antidiscrimination laws and regulations. Violations may be reported from previous examinations.*

In the context of the fair lending examination process, discrimination includes the treatment of minority areas or persons and businesses in minority areas in factors D and F as well.

*The 1995 Revised Regulations*<sup>22</sup>

**The Consideration of Discrimination in the Assessment Area:**

That the delineation of the community must not eliminate minority areas (i.e., redlining) was considered clear from the beginning of the law. When the regulations were revised in 1995, the section on the delineation of the assessment area allowed some flexibility in the geographic definition of the “community” but it made the civil rights intent of eliminating geographic redlining even more clear in stating:

*§228.41(e) Limitations on the delineation of an assessment area. Each bank's assessment area(s):*

- (1) Must consist only of whole geographies;*
- (2) **May not reflect illegal discrimination;***
- (3) May not arbitrarily exclude low- or moderate-income geographies, taking into account the bank's size and financial condition. (emphasis added)*<sup>23</sup>

The revised statement of the delineation of the assessment area makes it even more clear that minority areas cannot be excluded. As indicated in the delineation of the assessment area and consistent with the fair lending examinations, banks may not exclude minority areas from the areas upon which the examination process is based. The 2022 proposed regulation also includes the statement that an assessment area may not reflect illegal discrimination. Minority areas and their residents and businesses are entitled to full and equal access to all the lending, investment, and banking services that are considered in the examination process.

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<sup>22</sup> The revised regulations for the CRA were published in the **Federal Register** May 4, 1995 (Volume 60, No. 86), at pages 22156 to 22223. Each regulatory agency had its own set of regulations, but they are identical aside from technical references to each agency. Excerpts are taken from the version for the Federal Reserve Board (12 CFR Part 228).

<sup>23</sup> The assessment area is incorporated into the examination process according to the following section of the regulations (using the version for the Comptroller of the Currency).

*Section 25.41 Assessment Area Delineation:*

*(a) A bank or savings association shall delineate one or more assessment areas within which the appropriate Federal banking agency evaluates the bank's or savings association's record of helping to meet the credit needs of its community. The appropriate Federal banking agency does not evaluate the bank's or savings association's delineation of its assessment area(s) as a separate performance criterion, but the appropriate Federal banking agency reviews the delineation for compliance with the requirements of this section.*



### **The Special Consideration of Discrimination and Illegal Activities beyond the Lending, Service, and Investment Tests:**

Instead of specific assessment factors related to discrimination, the current regulations indicate that after the CRA rating has been assigned from the three tests, the regulator will consider the “effect of evidence of discriminatory or other illegal credit practices”. The version of this section from the regulations for the Federal Reserve Board at §228.28(c) states:

- (1) The Board's evaluation of a bank's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance. In connection with any type of lending activity described in Sec. 228.22(a), evidence of discriminatory or other credit practices that violate an applicable law, rule, or regulation includes, but is not limited to:*
- (i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;*
  - (ii) Violations of the Home Ownership and Equity Protection Act;*
  - (iii) Violations of section 5 of the Federal Trade Commission Act;*
  - (iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and*
  - (v) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission.*

The 2022 NPR incorporates a similar version of this separate provision adapted to the NPR’s more complex definitions of the assessment matrixes, assessment areas, institutional facilities included in the evaluation, and the inclusion of additional consumer laws.<sup>24</sup> As in the existing regulations, consideration is given to “evidence of discriminatory or other practices that violate an applicable law, rule, or regulation” including “discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act”.

The revision of the CRA regulations in 1995 reorganized and restructured the assessment factors around a lending test, a service test, and an investment test. Some might mistakenly focus on the fact that there is no direct component of the three examination tests that specifically requires the direct consideration of discriminatory behavior. But the fair lending examinations continue to apply to the overall consideration of access to banking facilities and services as well as lending. These are exams that should provide evidence of discriminatory behavior identified directly by the regulatory agencies. In addition, they are supposed to include the consideration of evidence of discrimination from other sources as well, including complaints and actions by other agencies and private parties, as codified in the fair lending examination procedures.

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<sup>24</sup> See pages 540-541 of the PDF version of the NPR under what is defined as §\_\_\_\_.28 Assigned Conclusions and Ratings.

One might note that the Dodd-Frank Act transferred the oversight of many consumer law provisions to the Consumer Financial Protection Bureau in 2010. This applies to institutions with over \$10 billion in assets. As such, the CFPB rather than the prudential regulatory agencies engages in the consumer compliance examinations for these institutions. The prudential regulatory agencies are still obligated to perform the consumer compliance examinations for institutions with less than \$10 billion in assets. Moreover, the Dodd-Frank legislation did not transfer the oversight of the Fair Housing Act to the CFPB. Therefore, the prudential regulatory agencies are still required to conduct the fair lending exams related to the FHA for all of their regulated institutions.

Because the regulators are to include evidence from sources other than their own examinations, the fact that the CFPB performs the consumer compliance examinations for ECOA and other consumer laws does not mean that the prudential regulators are only responsible for considering evidence of discrimination in violation of the FHA for institutions with more than \$10 billion in assets. Indeed, the section below indicates how violations of consumer laws other than the FHA are taken into account in assigning the final CRA ratings.

Clearly, the regulators are specifically required to consider any evidence of discrimination and take that into account in assigning the final rating as part of the examination process. This consideration is a formal part of the CRA rating process. Seen in the larger context of the fair lending laws, the fair lending examination process, and the prohibition from excluding minority areas from the assessment area, the consideration of evidence of discrimination as the final activity in the rating process places it above the individual assessment factors.

### **About the Inclusion of “Low- and Moderate-Income Neighborhoods” in the CRA**

Those opposing the inclusion of a consideration of race often point to the fact the text of the act includes consideration of “low- and moderate-income neighborhoods” but no mention of race.<sup>25</sup> While the CRA is properly cited as part of a battery of civil rights laws, there are no Federal laws that define low- and moderate-income neighborhoods as a protected class. One may note that at every point where this term is used in the text of the Act, it refers not to individuals but to geographic areas. This is a unique geographic term that was included in the

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<sup>25</sup> See for example, §2903. Financial institutions; evaluation

(a) *In general*

*In connection with its examination of a financial institution, the appropriate Federal financial supervisory agency shall:*

*(1) assess the institution's record of meeting **the credit needs of its entire community, including low- and moderate-income neighborhoods**, consistent with the safe and sound operation of such institution; and*

*(2) take such record into account in its evaluation of an application for a deposit facility by such institution. (emphasis added)*

CRA, but that did not exist in other Federal banking and consumer laws. Had these areas not been specifically identified as a kind of protected class under the CRA, the prudential regulatory would not have the authority to create such a class and include such a class in their examination process. Therefore, the Act requires that such areas be included within the entire range of areas to be included in a bank's service area.

It is also clear that the prudential regulators consider violations of many laws that are not specifically defined in the CRA. In addition to the Fair Housing Act and the Equal Credit Opportunity Act, the current NPR lists other laws that the regulators are to consider for compliance and evidence of illegal activities before making the final rating, including:

- Violations of the Home Ownership and Equity Protection Act;
- Violations of section 5 of the Federal Trade Commission Act;
- Violations of 12 U.S.C. 5531 (regarding unfair, deceptive, or abusive acts or practices in connection with consumer financial products or services);
- Violations of section 8 of the Real Estate Settlement Procedures Act;
- Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission;
- Violations of the Military Lending Act; and
- Violations of the Servicemembers Civil Relief Act.

Indeed, reviews of the public CRA ratings indicate that violations of these acts as well as violations of the FHA and ECOA are used to adjust the final CRA rating even though they are not listed in the text of the CRA. For example:

- The 2012 US Bank rating by the OCC was reduced for unfair and deceptive credit card practices;
- The 2012 Eagle Bank and Trust FDIC rating was reduced for redlining and violations of the FHA and ECOA;
- The 2012 Wells Fargo OCC rating was reduced for violations of the FHA, ECOA, the Federal Trade Commission Act, unfair and deceptive practices of the Consumer Financial Protection Act, noncompliance with the Servicemembers Credit Relief Act, and violations of the Real Estate Settlement Procedures Act;
- The 2013 BankcorpSouth FDIC rating was reduced for redlining and violations of the FHA and ECOA;
- The 2014 HSBC OCC rating was reduced for violations of the Servicemembers Credit Relief Act; and,
- The 2018 Citibank OCC rating was reduced for unfair and deceptive practices related to student loans and for misconduct in servicing mortgage loans.

Therefore, the CRA examination and rating process routinely incorporates the assessment of violations of a wide range of consumer laws not included in the text of the Act. This takes place without the regulatory agencies being subjected to a legal challenge for holding the banks accountable for compliance with these laws as part of the CRA evaluation and rating process.

### **The Existing Treatment of Affirmative Programs**

Amendments to the CRA have created some language that specifically considers certain activities that can receive credit for their CRA performance. These are essentially affirmative action programs. These programs go beyond the assessment of compliance with existing laws. As such, they need to be written into the law. Otherwise, the prudential regulators would likely be required to justify the consideration of these programs and activities under the legal concept of “strict scrutiny” in order to demonstrate that these programs are consistent with the existing legal authority of the regulators, necessary to achieve goals consistent with the CRA legislation, respond to a well-documented need in the market, do not penalize institutions that do not engage in such activities, and are tightly tailored to correct only the specific existing market failures.

One example is the special activity defined in an amendment to the CRA that provides credit for banks providing investments, loans, and other ventures to minority- and women-owned and low-income credit unions. Under §2903 (b) of the Act, the amendment reads:

*In assessing and taking into account, under subsection (a), the record of a nonminority-owned and nonwomen-owned financial institution, the appropriate Federal financial supervisory agency may consider as a factor capital investment, loan participation, and other ventures undertaken by the institution in cooperation with minority- and women-owned financial institutions and low-income credit unions provided that these activities help meet the credit needs of local communities in which such institutions and credit unions are chartered.*

A second such program provides credit for majority-owned institutions that sell, rent, or donate facilities for use by minority- and women-owned institutions. Under §2907 (a) of the Act the amendment reads:

*In the case of any depository institution which donates, sells on favorable terms (as determined by the appropriate Federal financial supervisory agency), or makes available on a rent-free basis any branch of such institution which is located in any predominantly minority neighborhood to any minority depository institution or women's depository institution, the amount of the contribution or the amount of the loss incurred in connection with such activity may be a factor in determining whether the depository institution is meeting the credit needs of the institution's community for purposes of this chapter.*

It is important to note that these provisions represent special purpose programs that banks are not required to make and that are considered as extra credit for those institutions that report these activities. They are not meant to counter substantive violations of civil rights or consumer laws. They are not part of - or a replacement for - the affirmative obligation of the regulatory agencies to enforce the provisions of the Fair Housing Act, the Equal Credit Opportunity Act, or the provisions of the Community Reinvestment Act that apply to all persons and businesses served by the banks.

### **Fair Lending Compliance Is Not About Affirmative Programs**

The section above describes the use of affirmative action programs in the CRA evaluation process. In administering their programs in compliance with the FHA and ECOA, the prudential regulators are **not** engaged in special affirmative action programs. Their fair lending examinations and their consideration of the FHA and ECOA violations are about compliance with the provisions of established laws. The affirmative obligation placed on the regulatory agencies under the FHA is about being active in enforcing the existing provisions of the FHA and not about creating activities that go beyond the enforcement of the compliance with the Act. Violations of the FHA and ECOA are about failing to comply with the fundamental requirements of these civil rights acts.

The obligation for the prudential regulatory agencies to include the consideration of racial discrimination is deeply imbedded in the affirmative requirements placed on the regulators by the Fair Housing Act. It is imbedded in the fair lending examination procedures. It is incorporated into the CRA regulations against illegal discrimination in defining assessment areas. Considering violations of the FHA and ECOA is defined as the consummate process beyond the three CRA tests as the final act in assigning ratings.

**As noted in the body of this comment, if the CRA is part of the battery of Federal civil rights legislation, then it must include a clear focus on the classes protected by the civil rights laws. The prudential regulators cannot administer the Fair Housing Act affirmatively, or the FHA and ECOA at all, without the direct consideration of race in their examination and oversight of the regulated institutions.**

## **Part Two**

### **The Treatment of Race Discrimination Law Violations in the Community Reinvestment Act Examinations and Ratings**

This part of the comment analyzes the results of a survey of judgments, verdicts, settlements, conciliation agreements, and consent orders related to civil rights and consumer laws involving banks covered by the Community Reinvestment Act. As opposed to simple complaints, these cases indicate that the charges merit serious consideration and a response in the CRA examination process. These cases are compared to the CRA public performance evaluations given to the banks during the time of the violations. The purpose is to provide examples of how such evidence of discrimination and illegal practices are treated by the prudential regulatory agencies in their CRA examinations and ratings. As indicated in Part One of this comment, the current CRA regulations prohibit banks from any illegal discrimination in defining their assessment areas(s). Secondly, before assigning the final CRA rating in an examination, the prudential regulatory agencies are required to consider evidence of discrimination, as well as other illegal, unfair, and deceptive practices that would result in a reduction in the rating.

The laws that are the primary focus of this analysis are the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA). In the cases of redlining and mortgage discrimination, the great majority of the cases are violations of both the FHA and ECOA. It is also important to note that most redlining cases include claims of discrimination in the provision of banking services (such as branch locations), the marketing of services, and disparities in the treatment of minority applicants. In considering the treatment of these violations, the analysis focuses on instances where violations of the FHA and ECOA have resulted in judgments, verdicts, settlements, conciliation agreements, and consent orders but where the violations were not identified by the prudential regulatory agencies during the relevant examination period.

#### **Part Two Summary**

It may be that some fair housing and discrimination practices are not easy to uncover. But what the cases from this survey show is that in every case, some agency, state or local government body, or organization did discover these violations of the fair housing, fair lending, and consumer protection laws while the prudential regulatory agencies charged with holding the banks accountable for such violations did not find them on their own. Many of these violations were discovered and challenged by local organizations and municipalities with far fewer enforcement resources than those available to the financial regulatory agencies.

The failures of the prudential regulatory agencies to find and sanction banks for racial discrimination is not only spread across decades of examinations but is concentrated more heavily in the period after the CRA regulations were revised in 1995 and after the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

What is most disturbing is, that in so many of the cases in the survey, prudential regulatory agencies:

- Did not consider stark evidence of racial redlining presented to them by the Department of Justice, as well as municipalities and private parties;
- Typically ignored cases that were not brought by federal enforcement agencies;
- Blatantly ignored the most obvious fair lending implications and disparate impacts of fraud and abuses in millions of mortgage underwriting and servicing violations even as they imposed billions of dollars in fines on the offending banks;
- Often made retroactive changes to account for violations, exempting the violations from subsequent examinations and making it hard to determine how and when violations were considered; and,
- Worked hard to avoid finding racial discrimination when they did recognize a case by misrepresenting the issue as a failure to serve low- and moderate-income markets rather than racial minorities and communities.

### **The Data**

The data supporting these comments are based on an initial search for redlining and race discrimination lending cases from the U.S. Department of Justice, the U.S. Department of Housing and Urban Development (HUD), the Consumer Financial Protection Bureau, states attorneys general, city governments, private attorneys representing parties such as fair housing organizations and other civic and community-based organizations, as well as the prudential regulatory agencies themselves. The cases begin with the DOJ settlement with Decatur Federal Savings in 1993 and continue to the current year. Throughout this analysis, the term “race” is used to include both race and ethnicity. The survey did not include cases where a single customer or event was the basis of the claim unless the case related to a general bank policy or practice.

The initial survey also included cases of violations of other consumer laws that the prudential regulators are instructed to consider in assigning the final CRA rating. These include many instances where the violations were identified as the result of consumer compliance examinations or complaints filed with the Consumer Financial Protection Bureau (CFPB). In 2010, the Dodd-Frank Act transferred the responsibility for conducting consumer compliance examinations for institutions with assets over \$10 billion to the CFPB. This includes ECOA but does not include the Fair Housing Act. Therefore, the prudential regulatory agencies maintain the responsibility for examining all the regulated banks for compliance with the Fair Housing Act, including those with assets over \$10 billion. Moreover, the prudential regulators also maintain the responsibility to examine all the regulated banks with assets less than \$10 billion for compliance with all consumer laws.

The survey identified 104 claims of fair lending and consumer protection violations that resulted in judgments, verdicts, settlements, conciliation agreements, and consent orders. The cases ranged across the period from the discrimination suit against Decatur Federal Savings and loan in 1992 to the present, across the different regulatory agencies, and across the issues involved, and across the different formats for the complaints and outcomes. Surely, there are cases of violations that have been missed in this survey and we welcome the reviews of cases that were not found in the survey. Nonetheless, we consider the survey reasonable in providing a sample of the kinds of cases that should be considered by the prudential regulatory agencies in their consideration of discrimination and other illegal activities that could result in a reduction in an institution's CRA rating.

A review of the full 104 cases in the survey determined that there were 84 cases where the violations were not identified and considered in the CRA evaluation during the exam period where they occurred. The analysis begins with a review of the complaints, settlements, verdicts, court rulings, and conciliation and consent orders so that we may define the nature of the issues, the scope of the issues, and the time period during which they occurred.

Given the vague statements in many CRA public performance evaluations about exactly what violations were considered, beginning with documents related to the violations is an essential part of the analysis. Indeed, reviewing only the performance evaluations would not provide a reasonable basis for conclusions about how violations were treated. The documents related to the violations are compared to the public performance evaluations for the subject institutions that cover the time period when the violations occurred.

To validate that the violations were not considered during the examination period, the CRA exams after the relevant time periods – and in some cases before the time period - were also reviewed. Including evaluations made after the time period of the violations is important because there are many times when the regulatory agencies did indicate the consideration of the violations after the examination period when they occurred. Indeed, it was not unusual for the regulatory agencies to retroactively lower a previous CRA rating as a result of information about violations that was dated after the relevant examination period when those violations occurred.

### **Summary of Redlining and Mortgage Discrimination Cases**

The following table summarizes the redlining and mortgage discrimination violations defined in the cases overall with details on the Fair Housing Act mortgage discrimination cases from the survey:



**Summary of the CRA Review of Settlements, Judgments and Verdicts, and Consent and Conciliation Orders against Banks from the Dacatur Federal Case to the Present**

Total cases where violations of the FHA, ECOA, and other laws were not found in the exam during the violation period by the regulator	84	% of Total Cases	% of the Subgroup
Total cases related to FHA or ECOA discrimination violations	45		
Percent of all 84 cases that are FHA or ECOA discrimination cases		54%	
Total cases related to FHA or ECOA mortgage discrimination violations*	41		
Percent of all 84 cases that are FHA or ECOA mortgage discrimination cases		49%	
Total FHA and ECOA mortgage racial discrimination cases**	38		
Percent of all 84 cases that are FHA or ECOA mortgage racial discrimination cases		45%	
FHA racial cases after 1995 CRA regulations	34		
Percent of the 38 mortgage discrimination cases			89%
FHA racial cases after 2010 Dodd-Frank	25		
Percent of the 38 mortgage discrimination cases			66%
Cases after 2010 for the FDIC	9		
Cases after 2010 for the OCC	12		
Cases after 2010 for the Fed	3		
Cases after 2010 for the OTS***	1		
Total FHA redlining cases with assessment area/branch maps	19		
Map cases after 1995 CRA regulations	18		
Cases after 2010 Dodd Frank	16		
Percent of the 19 map cases after 2010			84%
Map cases after 2010 for the FDIC	9		
Map cases after 2010 for the OCC	4		
Map cases after 2010 for the Fed	3		

\* This includes 2 cases related to disability status and 1 case related to familial status.

\*\* Essentially all the FHA mortgage discrimination cases also involved ECOA claims as well.

Based on the cases in the survey, more than half of all types of violations that were **not** detected by the regulatory agencies in the course of the CRA examination (54%) were related to discrimination against classes protected under the Fair Housing Act and ECOA. Just under half of all the cases (49%) were specifically related to mortgage discrimination and 45% of all the cases were specifically related to racial discrimination under both the FHA and ECOA.

While the cases cover a period from 1993 to the present, 89% of these cases occurred **after** the implementation of the 1995 revised CRA regulations (34 of 38 cases). Indeed, two-thirds of these cases occurred after the passage of the Dodd-Frank reform legislation (25 of 38 cases). This raises a serious question as to whether the prudential regulatory agencies have become dramatically worse at identifying and enforcing violations of mortgage discrimination in the CRA process.

### *Redlining Cases and Examples*

Some may argue that the identification of discrimination may be a difficult task despite decades of experience by the regulators using the required, and extensive, fair lending

examination process. There is, however, one form of identifying discrimination that hardly requires a sophisticated approach. This is the identification of assessment areas that clearly and systematically exclude minority neighborhoods. Such exclusions are specifically prohibited by the CRA regulations and represent the boldest form of redlining – the precise activity that the CRA was created to eliminate. Simply comparing the geographic areas defined as a bank’s assessment area(s) and comparing that to the distribution of minority populations provides a clear and obvious basis for identifying redlining in that it illegally excludes minority areas. Other redlining cases compare lending and/or branch location data to expose clear differences between the majority-white areas and the majority-minority areas within a bank’s assessment area(s). Redlining cases typically demonstrate severe and obvious disparities in lending patterns.

Half of the racial discrimination cases in mortgage lending (19 of 38) produced maps to support claims of redlining. As the table above indicates, 18 of these 19 cases were for the time period after the implementation of the 1995 regulations that had strengthened the language prohibiting the elimination of minority areas from a bank’s assessment area(s). Moreover, 16 of these cases (84%) occurred after 2010. All of the regulatory agencies were involved in failing to detect or consider these cases.

Examples show both redlining in terms of how assessment areas excluded minority communities and also how even when such areas were included, they were treated differently from white areas. Typically, these maps show the differences in banking facilities. In other cases, the maps show differences in applications and lending data either within the subject bank or by comparing the subject bank to the patterns for comparable institutions.

The examples below begin with three case reviews that include the maps and references to both the DOJ discrimination cases and the regulator’s CRA evaluation. This is followed by short summaries from additional examples across the time period and agencies.

### **Old Kent Bank:**

Old Kent Bank represents a classic case of geographic redlining that was overlooked by its CRA regulator. In its 1999 CRA examination the Federal Reserve Bank of Chicago gave Old Kent Bank a Satisfactory rating. The exam covered the period from 1997 to 1999. At page 16, the exam concluded:

*The bank is in compliance with the substantive provisions of antidiscrimination laws and regulations, including the Equal Credit Opportunity Act (ECOA) and Fair Housing Act. No substantive violations were noted. The bank is also in compliance with the technical requirements of the Community Reinvestment Act (CRA). The public file and CRA notices were reviewed and deemed to be in compliance.*

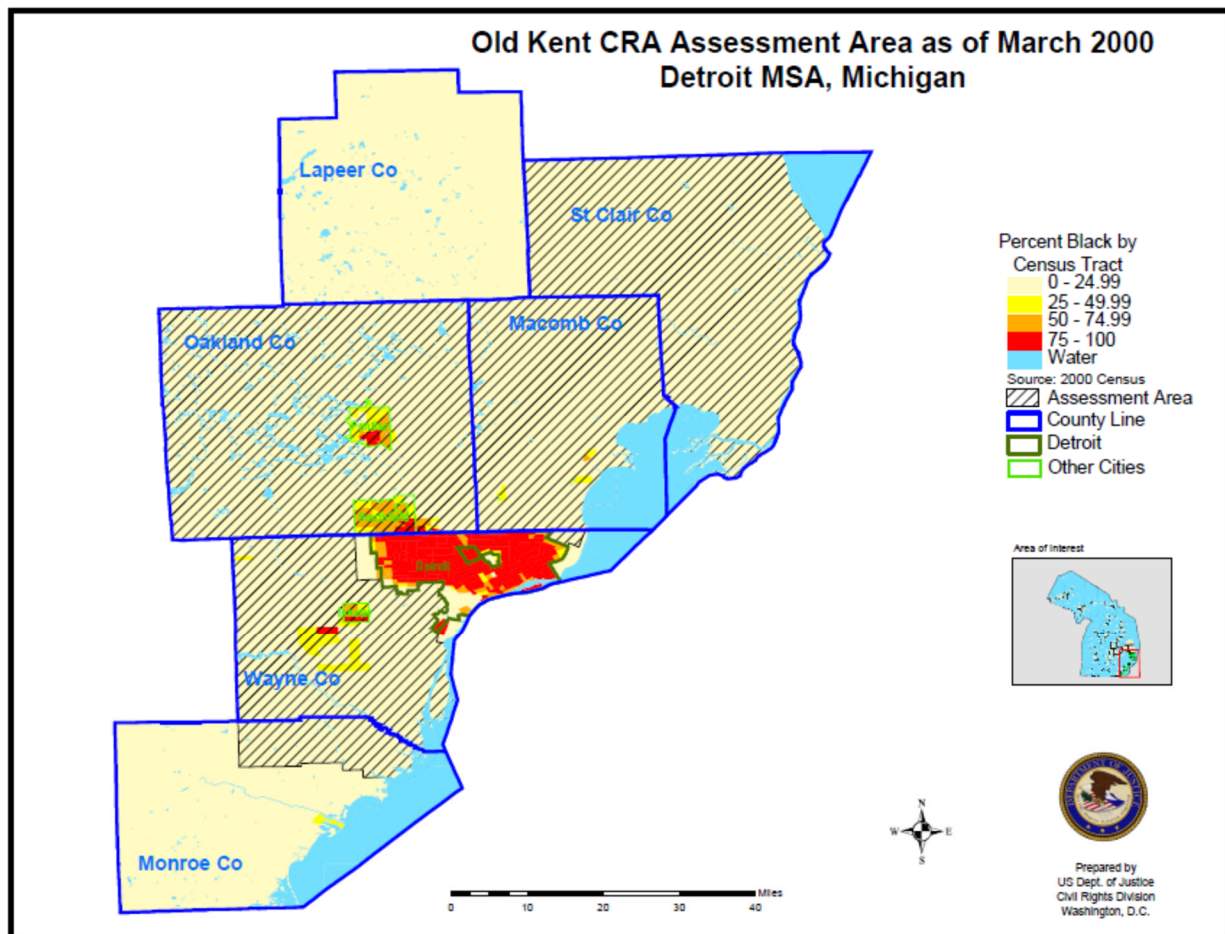
In 2004, the Department of Justice filed a racial discrimination complaint against Old Kent. The complaint covered the time period from 1996 to 2000, including the entire time period of the Fed’s CRA exam. At paragraph 17, the complaint stated that:

*As of January 1996, Old Kent Bank operated at least 18 branches in the Detroit MSA. Not a single one of these branches was located in the City of Detroit. As of March 2000, Old Kent Bank had expanded its business presence in the Detroit MSA to include a branch network of at least 53 branches, located in every county of the Detroit MSA. Virtually all of Old Kent Bank's branches were located in predominantly white suburbs. As of March 2000, Old Kent Bank still did not have a single branch in the City of Detroit, where the population is more than 81% African American.*

At paragraph 23, the complaint stated that:

*Instead of defining its assessment area in accordance with Regulation BB, Old Kent Bank circumscribed its lending area in the Detroit MSA to exclude most of the majority African American neighborhoods by excluding the City of Detroit.*

The complaint included the following map that indicated how the assessment area surrounded, but excluded, the City of Detroit:



## **Centier Bank:**

Centier Bank in northern Indiana offers one of the most extraordinary examples of how a regulatory agency contorted, misrepresented, and ignored overwhelming evidence in order to avoid admitting that it eventually reduced a bank's CRA rating due to discrimination. The regulator wrestled against the facts across three CRA evaluations in order to claim that the Needs to Improve it eventually assigned to the bank was related to lack of service in low- and moderate-income areas and not to race.

In its 1999 CRA examination, the Federal Deposit Insurance Corporation gave Centier Bank a Satisfactory rating. The exam covered the period from the end of 1996 through the first three months of 1999. The public report states that this is the first exam covered by the CRA regulations that were revised in 1995. After a summary of the adequacy of Centier's lending, service and investments tests, the report states:

*No violations of the substantive provisions of the antidiscrimination laws and regulations (including the Equal Credit Opportunity Act and the Fair Housing Act) were identified. The bank has policies, procedures, and training programs in place to deter discriminatory or other illegal credit practices.*

Again, in its 2002 CRA examination, the Federal Deposit Insurance Corporation gave Centier Bank a Satisfactory rating. The exam covered the period from April of 1999 through June of 2002. (The public report was not released until April of 2003.) At page 2, the exam concluded:

*There were no substantive violations found with regard to the provisions of antidiscrimination legislation, including the Equal Credit Opportunity Act and Fair Housing Act. The bank has policies and procedures in place to deter discriminatory or other illegal credit practices from occurring at the institution.*

At page 6 the CRA exam stated:

*Centier Bank's assessment area conforms to the CRA regulatory requirement.*

In 2006, however, the Department of Justice filed a race discrimination complaint against Centier Bank which operated in the Gary Indiana Primary Metropolitan Statistical Area (PMSA). The claim period covered 2000 to 2004. The entire complaint was based on race discrimination. In fact, the word "income" does not appear in the complaint in any form. At page 8, the complaint noted that "According to the 2000 Census, nearly 90% of the Gary PMSA's African-American residents lived in the cities of Gary, Hammond, and East Chicago." Then at page 18, the complaint stated:

*Instead of defining its assessment area in accordance with Reg BB, Centier long circumscribed its lending area in the Gary PMSA to exclude most majority-minority neighborhoods, including having two geographically separate assessment areas for many*

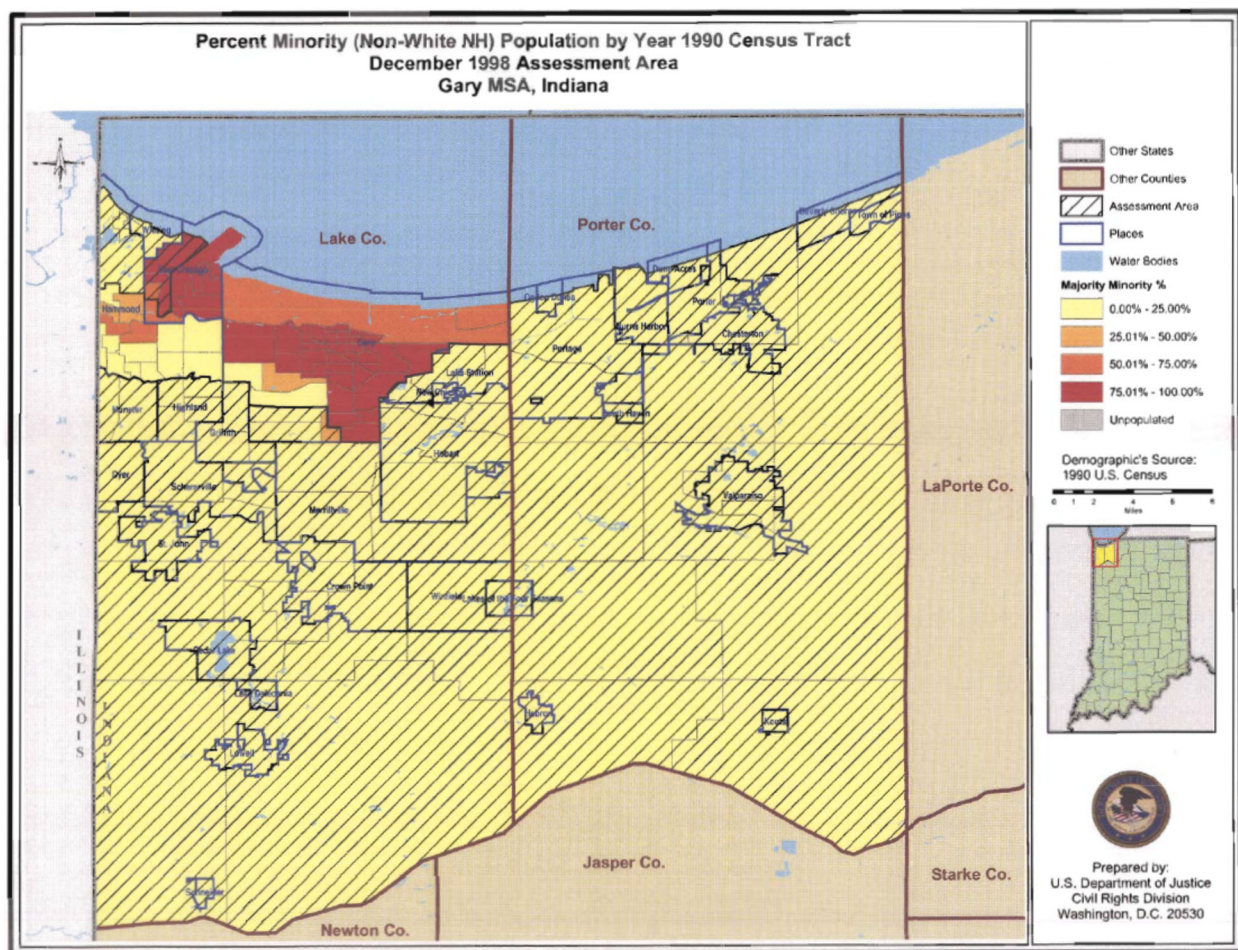


years. Until late 1999, Centier's CRA assessment area included only three majority-minority census tracts from Gary, East Chicago, and Hammond, despite the fact that a large number of minority tracts were adjacent to the non-minority tracts included in the assessment area.

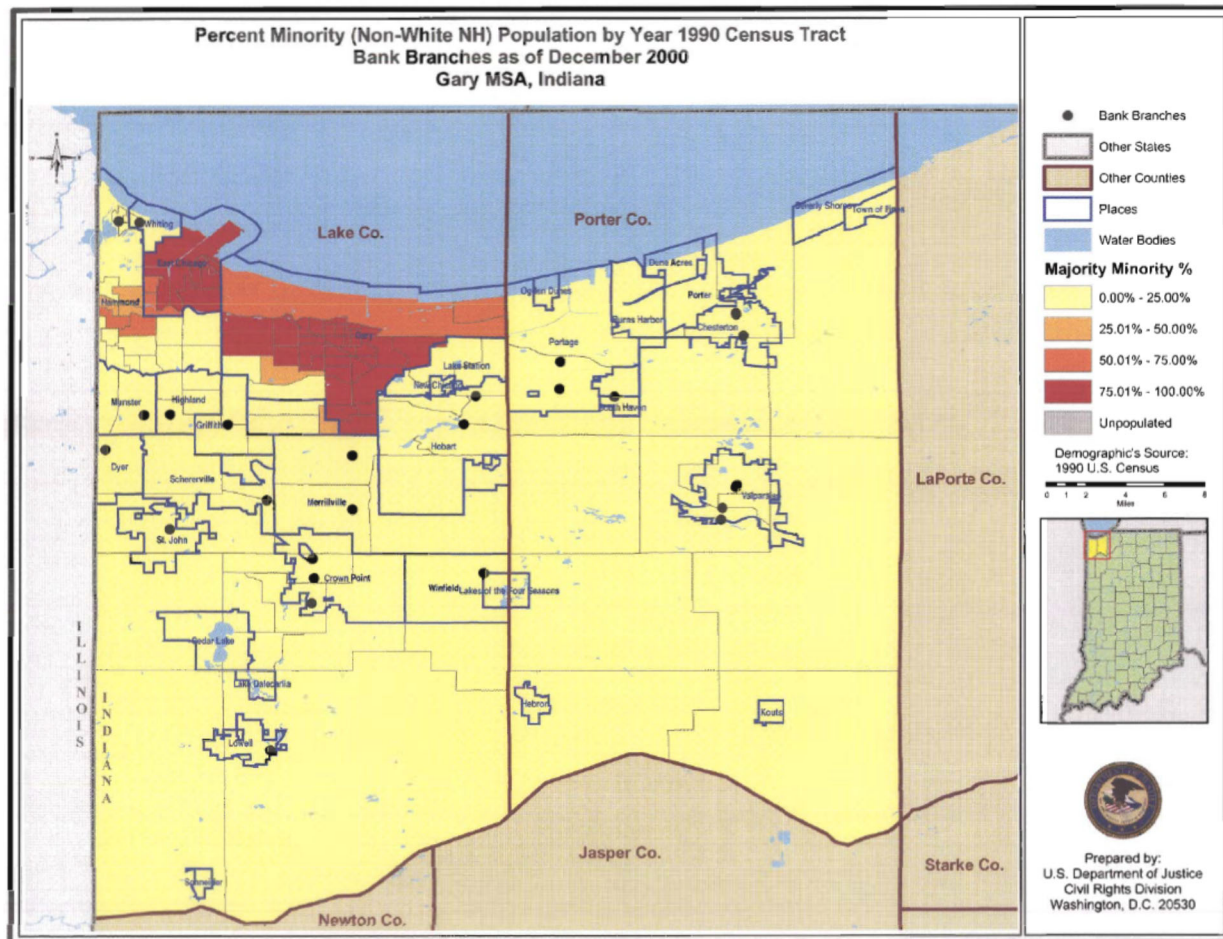
At page 12, the complaint summarized the lending and branching patterns by stating:

*Centier has engaged in a race- and national origin-based pattern of locating or acquiring branch offices and determining what services to provide at each. It has located or acquired branch offices and chosen to provide varying levels of banking and lending services at them in a manner designed to serve fully the banking and credit needs of the residents of and small businesses located in majority white census tracts, but not those of residents of or businesses located in majority-minority census tracts.*

The complaint included the following map that indicated how the assessment area surrounded Gary, Hammond and East Chicago but excluded almost all the areas of minority concentrations in these cities:



The complaint documents the lack of lending in minority areas in Gary, East Chicago and Hammond at the time of the FDIC's examination. It also provided by providing the following map of the Centier's branch locations:



The complaint stated that in 1999:

*... the FDIC informed the Bank that its assessment area violated the CRA and its regulations. Not until then, and until Centier's Chairman had asked the FDIC whether the inclusion of Gary, East Chicago, and Hammond in its assessment area would require the opening of branches there, did Centier expand its assessment area to include all of Lake County.*

Nonetheless, as shown above, in the CRA examination that covered this period, the FDIC told the public that there were no indications of discriminatory activities. In fact, in the 1999 rating, with regard to the assessment area defined at that time in 1998 the CRA report stated:

*The assessment area as defined by the bank did not meet regulatory requirements. This evaluation is based on an assessment area which includes all of Lake County and 14 census tracts in Porter County. Both Lake County and Porter County are located in the Gary Indiana, Metropolitan Statistical Area #2960 (MSA).*



While the assessment area should have contained all of both counties (as the FDIC later required), the CRA report claims that the omitted census tracts were in Porter County, which is white, while the DOJ map clearly indicates that the omitted census tracts were in Lake County and were all areas of minority concentration in Gary, Hammond, and East Chicago. In misrepresenting the excluded areas, the FDIC was able to avoid addressing a clear illegal racial redlining pattern at that time. The FDIC continued to claim there was no pattern of discrimination in the 2003 CRA rating.

Only in the 2007 CRA public examination did the FDIC finally assign Centier with a Needs to Improve rating. But even then, its public evaluation claimed this was due to its failure to adequately serve low- and moderate-income areas. There is no mention of race in connection to this rating. In summarizing the reasons for the Needs to Improve rating, the exam states at page 2:

*The geographic distribution of residential loans reflects poor penetration throughout the assessment areas, especially the low- and moderate-income census tracts in the Gary, Indiana, Metropolitan Division (MD). ... The institution exhibits a poor record in responding to the credit needs of highly economically disadvantaged geographies and low-income persons and small businesses.*

At page 39, with respect to the identification of “Fair Lending or Other Illegal Credit Practices”, the 2007 examination reads:

*The concurrent compliance examination [2007] conducted by FDIC examiners did not identify any violations of the substantive provisions of the anti-discriminatory laws and regulations. The bank does not appear to engage in any unfair or deceptive practices.*

In reference to the DOJ lawsuit, this section of the exam continues:

*However, the bank is under a voluntary Department of Justice consent order (Order) that requires the institution to have policies, procedures, training programs, internal assessment efforts, or other practices in place to prevent discriminatory or other illegal credit practices. This same Order requires management to take corrective action particularly with respect to increasing the bank’s lending in low- and moderate income census tracts. The bank appeared to be in compliance with the provisions of the Order at the time this evaluation was performed. Refer to page 5 for further information regarding the provisions of the Order. The institution’s poor lending performance within the low- and moderate income census tracts in the Gary, Indiana Metropolitan Division was given substantial weight when assigning the current CRA rating of “Needs to Improve”.*

While this clearly relates to the DOJ redlining lawsuit, the word “income” does not appear in any context in the complaint. This statement misrepresents the settlement order by claiming that it “requires management to take corrective action particularly with respect to increasing the bank’s lending in low- and moderate income census tracts”. There is nothing in the consent order related to “low- and moderate-income census tracts”. Moreover, all banks are

supposed to have “practices in place to prevent discriminatory or other illegal credit practices” as part of normal management activity.

Nonetheless, there was no way at this point to ignore the DOJ discrimination suit. The FDIC resolved this by reporting the suit and settlement in language that emphasizes that there is no admission of wrongdoing by the bank as indicated at page 5 of the 2007 report in a section not related to the reasons for assigning the Needs to Improve rating, it states:

*On October 16, 2006, the Bank entered into a Consent Decree Agreement with the U.S. Government (the Government) with respect to certain allegations made by the Government that the Bank had violated the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA) in predominately minority census tracts located in the Gary, Indiana, metropolitan division. The Government and the Bank agreed that the Consent Decree Agreement was not an admission or finding of any violation of the FHA or the ECOA by the Bank.*

Of course, virtually all settlements allow the defendant to avoid a direct admission of the charges, but in this context, such a statement serves to question the integrity of the claims. Essentially, the FDIC public evaluation reports the racial aspects of the DOJ suit in a manner that downplays any evidence that the bank engaged in illegal discrimination. It misrepresents the reasons for assigning the Needs to Improve rating to failing to properly service low- and moderate-income areas only. This is a clear indication of the unwillingness of the regulatory agency to accept that discrimination takes place even in the face of overwhelming evidence.

### **First American Bank:**

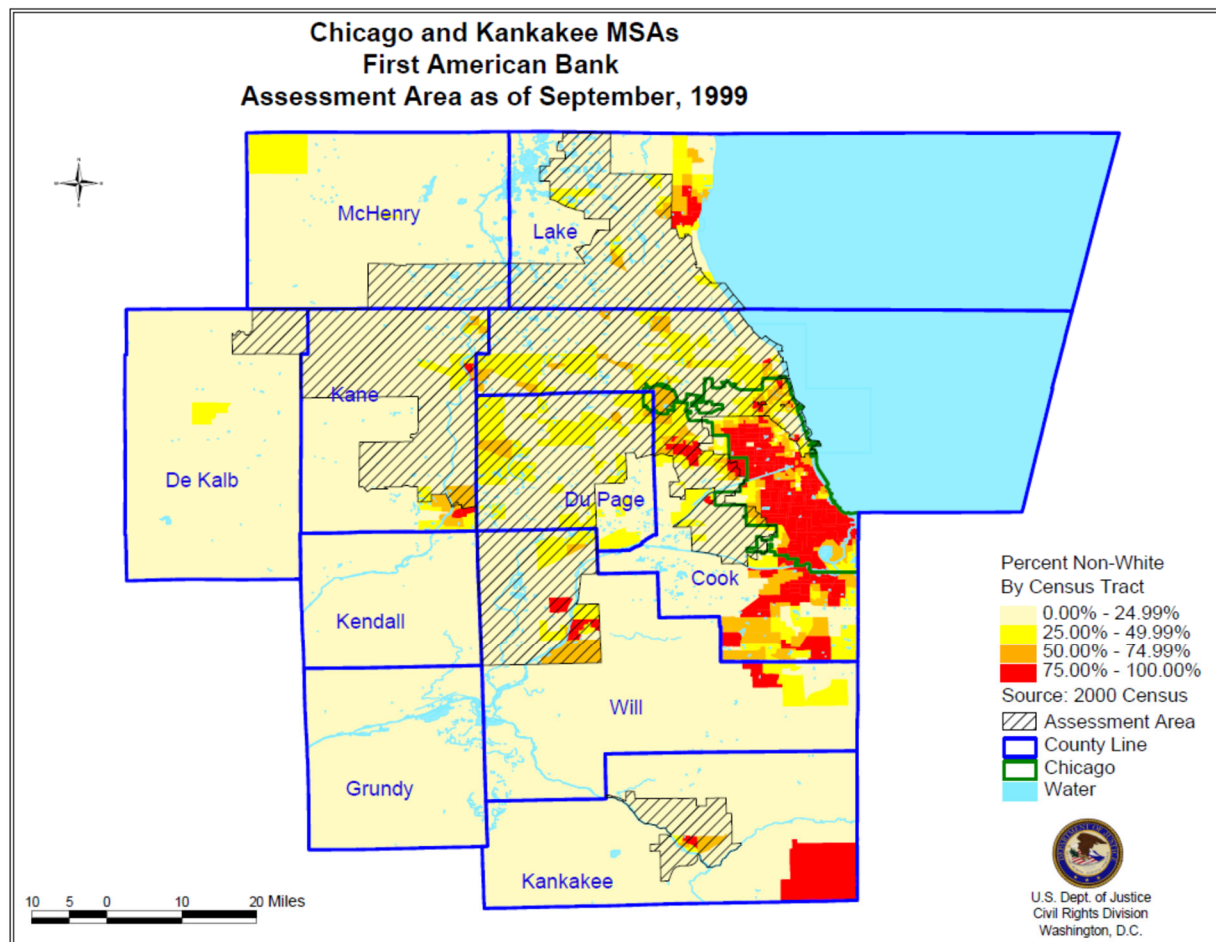
The case of First American Bank is an example of a bank that was being held accountable by its CRA regulator and then changed its charter and received a more accepting treatment of its discriminatory activities. In 2004, the Department of Justice filed a redlining and discrimination complaint against First American Bank in the Chicago metropolitan area. The suit was initiated by the Federal Reserve Board, which regulated the bank during its 2001 to 2002 CRA examination. Paragraph 6 of the complaint reads:

*Beginning in January 2001, the Federal Reserve Board conducted an examination of the lending practices of First American Bank to evaluate its compliance with the Fair Housing Act, the Equal Credit Opportunity Act, and the Community Reinvestment Act. Based on information gathered in its examination, the Board determined that it had reason to believe that First American was engaged in a pattern or practice of discrimination on the bases of race and national origin by redlining majority minority census tracts - defined as those with non-white populations of 50% or greater - in the Chicago and Kankakee, Illinois, metropolitan areas. The Board determined that the Bank was engaged in practices which prevented or discouraged the residents of those census tracts from obtaining equal access to residential, consumer, and small business credit because of the race, color, or national origin of the majority of the tracts' residents. The Board also lowered First American's CRA rating to "Substantial Noncompliance", the*



*lowest possible. Of the 312 lending institutions the Board rated for CRA compliance between July 1, 2001, and June 30, 2002, First American was the only lender to receive that rating; the Board rated 40 lenders as "Outstanding", 270 "Satisfactory", and 1 "Needs to Improve".*

As a result of its investigation, the DOJ charged that the bank had engaged in discrimination in the definition of its assessment area and in its mortgage lending, small business lending, marketing, the location of its branches, the location of its ATMs, and the location of its mortgage broker offices. DOJ produced the following map of the bank's assessment area in 1999:



The complaint provided detailed data on First American's mortgage and small business lending, indicating how only a small percentage of its loans were in minority census tracts even though these census tracts comprised slightly more than one-third of all the census tracts in the Chicago metropolitan area. The complaint concluded with the following statement:

*The discriminatory policies and practices of the defendant were, and are, intentional and willful, and have been implemented with reckless disregard for the rights of residents of minority neighborhoods.*

Meanwhile, in 2003, First American converted to a non-member state bank so that it was then regulated by the FDIC. While DOJ filed the discrimination suit in 2004, the FDIC conducted a new CRA review and assigned First American a Satisfactory rating for its CRA examination which covered 2002 and 2003. At page 8, the evaluation references the Federal Reserve Board's 2001 Cease and Desist order as "**based on alleged substantive fair lending violations** identified by the Federal Reserve Bank". (emphasis added)

At page 4-5 of the 2004 evaluation the FDIC states:

*There were no substantive violations found with regard to the provisions of antidiscrimination legislation, including the Equal Credit Opportunity and Fair Housing. The bank has policies and procedures in place to deter discriminatory or other illegal credit practices from occurring at the institution.*

In its 2007 CRA examination, the FDIC again assigned First American a Satisfactory rating. The report indicates that it found no violations of discrimination or other laws. It did however, mention the DOJ suit and settlement which were filed at the beginning of the evaluation period. At page 6 the evaluation states:

*First American Bank was assigned a CRA rating of "Satisfactory" at the prior Community Reinvestment Act evaluation, performed by the Federal Deposit Insurance Corporation as of March 1, 2004. On July 13, 2004, the bank stipulated to a Consent Order ("Order") with the Department of Justice (DOJ) to improve its lending practices in minority census tracts. Provisions of the Order include the opening of four branches in minority census tracts, specific dollar expenditures for marketing and consumer education, and interest rate subsidies. The Order, which has a five year term, was precipitated by a prior Cease and Desist Order resulting from a 2001 Federal Reserve Bank examination, which was terminated in April 2004.*

The final sentence attests to the persistence of the discrimination. Moreover, the 2007 report indicates that while the bank had opened 11 new branches in recent years while it was under the Federal Reserve Cease and Desist Order and the DOJ settlement, only one was even in a moderate-income area (at page 127) with no mention of any branches in predominantly minority census tracts in spite of the requirement in the DOJ settlement to open such branches. Surely this raises questions as to the bank's compliance with the DOJ order.

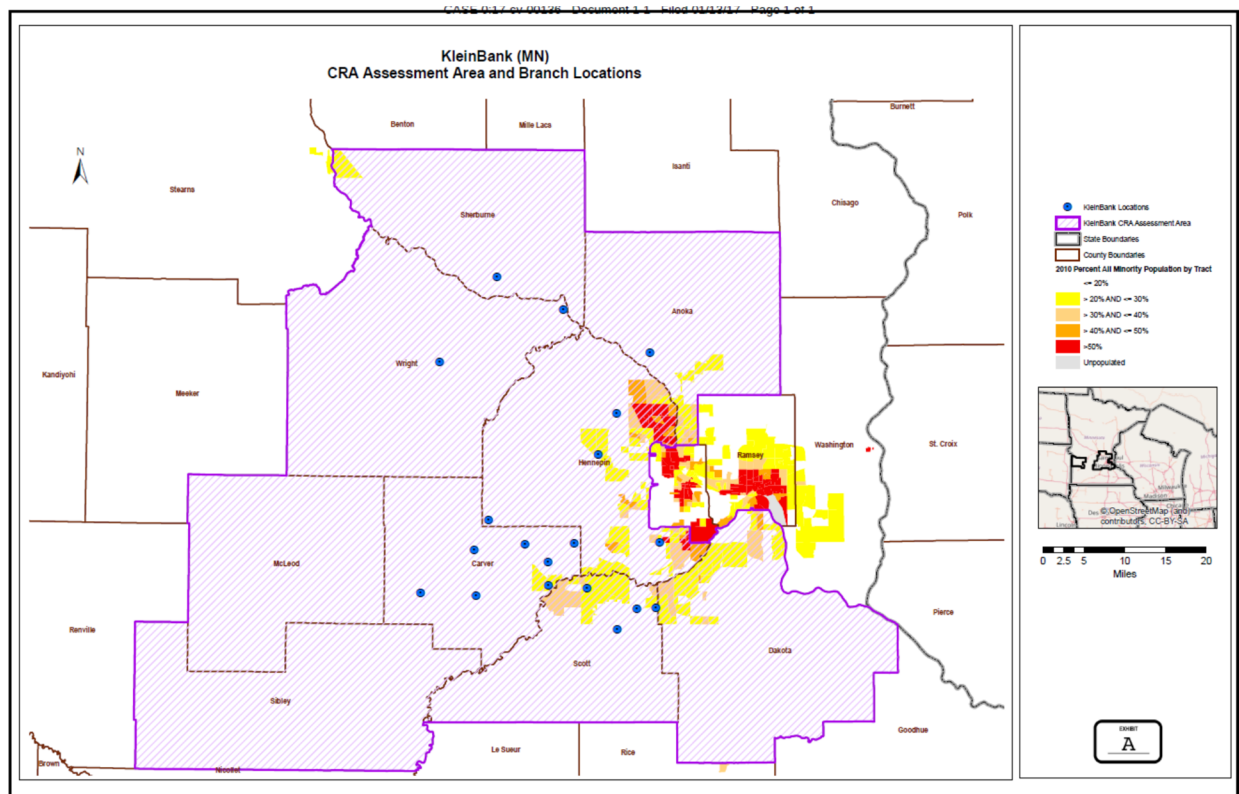
Nonetheless, the FDIC never reduced the bank's rating either in the 2004 report or in the 2007 report. Indeed, the 2007 report awarded First American with a High Satisfactory in both the lending and service tests. However, the report indicates (at page 14) that the bank's level of penetration for home purchase and home improvement loans in low- and moderate-income census tracts decreased from 2005 to 2006. Essentially, First American moved to a regulator that had little intention of holding it accountable for fair lending.

### Klein Bank and Old National Bank:

The cases of Klein Bank and Old National Bank provide an example of how the combined failure of different CRA regulators cascade into a pool of mergers and acquisitions. In 2013 the FDIC assigned a Satisfactory CRA rating to Klein Bank in Minnesota. The examination covered a period from 2010 to 2012. At page 52 the report indicated that the FDIC had found “no evidence of discriminatory or other illegal credit practices”. In 2015 the FDIC assigned another Satisfactory CRA rating to Klein Bank. This review covered the period from 2013 to 2015. At page 14 of the evaluation the FDIC stated:

*Examiners did not identify any evidence of discriminatory or other illegal credit practices. As such, this consideration did not affect the institution’s overall CRA rating.*

In 2017, DOJ filed a redlining and lending discrimination case against Klein Bank based on data from 2010 to 2015. This is the period covered by the two FDIC CRA evaluations. The DOJ provided the following map of Klein Bank’s assessment area and bank branches:



Minneapolis and St. Paul are the largest cities in the State of Minnesota. The assessment area excluded all of Ramsey County, which includes the City of St. Paul. The guidance for defining an assessment area is that it should contain entire counties. But the assessment area literally cut the City of Minneapolis out of Hennepin County. By excluding Minneapolis from Hennepin County, Klein Bank arbitrarily eliminated almost half of the Black and Hispanic population of the county. The DOJ case also indicated how the minority areas of Minneapolis and St. Paul as well as the minority areas within the assessment area had exceptionally low levels

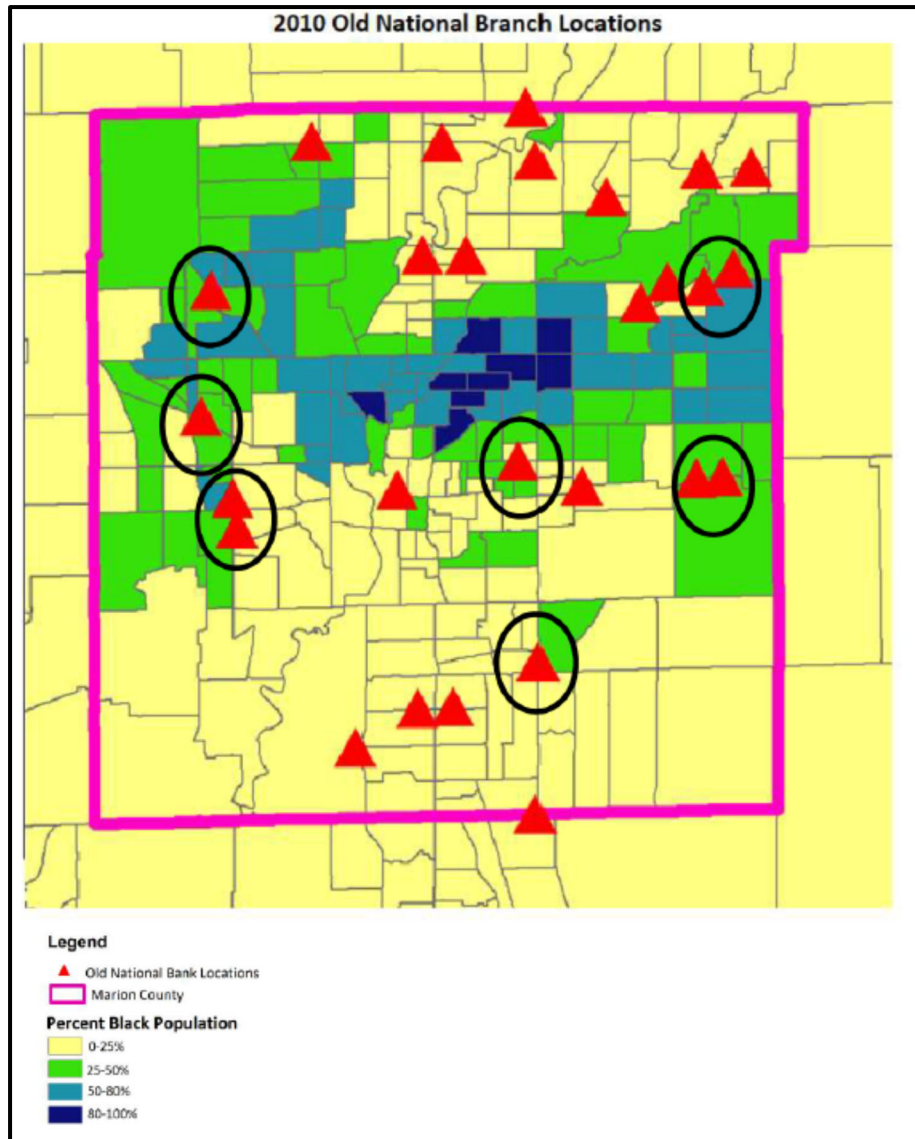
of lending. None of Klein Bank's branches were in either Minneapolis or St. Paul or in any minority census tract. A settlement agreement in 2018 required the bank to expand its assessment area and to open a branch bank in a minority community in Hennepin County as well as engage in fair lending training and engage in outreach and advertising targeted to minority markets.

In 2019 the OCC assigned a Satisfactory rating to Old National Bank, a regional bank out of Indiana. The exam period covered 2016 to 2018. The OCC found no evidence of discrimination. It gave Old National a High Satisfactory rating on its lending.

In 2021 the Fair Housing Center of Central Indiana filed a discrimination lawsuit against Old National Bank. The suit reviewed the bank's mortgage lending in 2019 and 2020 as well as the location of its branches from 2010 to 2020 related to its presence in Marion County. Marion County is in the center of the Indianapolis MSA and incorporates the City of Indianapolis.

The complaint noted that Old National made over 2,250 mortgage loans during the time period, but only 37 of these were to Blacks in the entire Indianapolis market, and only 23 were to Blacks in Marion County where over 90% of all the Blacks in the bank's assessment area live. Comparing Old National to peer lenders, the suit stated that while the peer lenders made 14.73% of their mortgage loans to Blacks in Marion County, Old National made only 3.86% its mortgage loans to Blacks in Marion County. As the complaint indicated, this is a nearly 4 to 1 racial disparity. It also attests to the ability of lenders to find sound lending opportunities in the Black communities in Marion County.

The complaint reviewed the pattern of opening and closing branches between 2010 and 2020. The map below indicates the location of Old National branches in 2010:



The ovals indicate the branches that were closed between 2010 and 2020 in Marion County. All of the closed branches were in or adjacent to areas that were at least 25% or more Black.

The suit also indicated that the fair housing center engaged in testing and found that Black testers were quoted less advantageous terms than the white testers even though all were equally qualified.

The discrimination claims of the Fair Housing Center date to well before the suit. Prior to this case and about a month after the Klein Bank settlement, Old National had announced its intention to acquire Klein Bank. The Fair Housing Center of Central Indiana had commented on the application and made substantially the same case that it later made in its lawsuit challenging the record of Old National. The approval of the acquisition by the Federal Reserve Board did include some responses to the Fair Housing Center's challenge.

At page 11 of the Federal Reserve stated:

*In response to the commenters' allegations, Old National asserts that approval of the proposed transaction is warranted based on Old National Bank's CRA performance evaluation. Old National notes that HMDA data do not take into consideration other critical inputs, such as borrower creditworthiness, collateral value, credit scores, and other factors relevant to credit decisions. Old National also asserts that HMDA data do not reflect the range of Old National Bank's lending activities and efforts within the communities it serves. Old National represents that it is committed to providing reasonable access to its delivery systems throughout its assessment areas and does not anticipate any branch closures as a result of this transaction.*

Such a response from the bank simply relies on the rating it got from the OCC that failed to address the racial disparities in lending and gave the bank a High Satisfactory score in the lending test. The remainder of the response is simply a set of standard public relations statements that provide no factual or substantive response to the Fair Housing Center's challenge related to the tiny number of loans made to Blacks in the largest Black housing market in Indiana. Nonetheless it seems adequate to satisfy the Federal Reserve.

At page 13 the Federal Reserve stated:

*Examiners found that Old National Bank's geographic distribution of loans was good, the geographic distribution of home mortgage loans was adequate, and the geographic distribution of small loans to businesses was excellent. Examiners noted that, overall, the distribution of loans by income level of the borrower and of home mortgage loans by income level of the borrower was good.*

In this response, the Federal Reserve considers the loan distribution good even though it appears to avoid almost completely minority census tracts. This response totally ignores the racial foundation of the challenge and, as is commonly the case with the regulators, changes the focus to income levels.

Lastly, at page 14 the Federal Reserve stated:

*Examiners concluded that the bank's record of opening and closing branches had adversely affected the accessibility of its delivery systems, particularly in LMI geographies or to LMI individuals. Examiners nevertheless found that the services offered and hours of operation were comparable among locations regardless of income level of the geography and that Old National Bank had made adequate use of alternative delivery systems through telephone and on-line banking, electronic bill pay, and mobile banking options.*

This response borders on the bizarre. First, this admits that the pattern of closing branches had an adverse effect on the areas where the branches were removed. Then, however, it completely ignores the racial basis of the challenge and focuses on the income levels of the patterns which were not what the challenge was about. The comment that the offices that

remained open all had the same hours of operation and services is a complete non sequitur as this has nothing to do with the impact on the places where offices no longer existed. The final statement about the adequacy of alternative delivery systems is essentially a claim that actual physical offices are of no real consequence or value.

Overall, this passes for a serious review of a substantive racial challenge to the practices of Old National and provides a basis for allowing it to acquire a bank that had already failed to serve minority areas fairly. Perhaps more worrisome is that it also provides the basis for allowing Old National to continue to acquire other financial institutions and expand its influence in the lending and banking markets.

Indeed, at the time of the Fair Housing Center's discrimination lawsuit, Old National Bancorp (which owned Old National Bank) was seeking to acquire First Midwest Bancorp (an Illinois corporation that owned First Midwest Bank). The notice of this application was published on June 25, 2021. Within two months (on August 19, 2021), the OCC approved the merger of the two banks. What remained was for the Federal Reserve to approve the merger of the parent bank holding companies. The Fair Housing Center seized the opportunity to recast its discrimination claims against Old National in the form of a fair housing lawsuit in Federal court. The case was filed initially on October 6, 2021 (ten days before the Federal Reserve approved Old National's acquisition of Klein Bank), with an amended complaint in November from which the citations above are taken.

With the tens of billions of dollars at issue in the acquisition, Old National settled the suit on December 16, 2021, and agreed to locate new branches in predominantly Black census tracts in Indianapolis and to increase its lending in Black census tracts, among other activities.

On January 27, 2022, the Federal Reserve approved of the acquisition. The new institution has more than \$45 billion in assets. The acquisition of First Midwest greatly expanded the operations of Old National, especially in Illinois. The new institution is the sixth largest bank system headquartered in the Midwest.

In concluding that Old National complied with the CRA requirements to meet the convenience and needs of its communities, the Federal Reserve relied heavily on the OCC's 2019 overall Satisfactory rating and its High Satisfactory rating in the lending test and the Outstanding rating in the Investment test. This was based largely on full scope reviews in Evansville, Indiana and Louisville, Kentucky, but not Indianapolis where the Fair Housing Center cited discrimination issues.

Where the Fair Housing Center had demonstrated the pattern of closing branches in and adjacent to minority areas, the Federal Reserve provided no comments on this issue and simply cited the High Satisfactory rating that the OCC had given to Old National based largely on the review in Evansville and Louisville.

The approval responded to the fair housing discrimination claims in lending with the previous generic comments that the HMDA data do not represent all the factors that determine loan eligibility. While that is true, it begs the question of the huge disparities in the lending for

Old National compared to its peers in Marion County. Why, one would ask, would the minorities applying to Old National be so likely to be unqualified compared to those applying to other lenders in the same market?

Notably, this is a case study where **all three of the prudential regulators participated in a process that failed to provide accountability for discrimination in lending.** The FDIC had failed to hold Klein bank accountable for its obvious redlining. The OCC had failed to identify the clear racial disparities in the lending and branch closings of Old National. The Federal Reserve Board waived aside and ignored the significance of the challenge to the merger and approved the acquisition of Klein Bank by Old National. This set up the cycle allowing the same review process to permit Old National to vastly increase its Midwest market in acquiring First Midwest without ever having been held accountable for discrimination by any prudential regulator. It is the failure of the regulators to engage in serious fair lending enforcement that forces groups like the Fair Housing Center to move to the Federal courts.

### **OneWest Bank:**

The CRA evaluations and ratings assigned to OneWest Bank by the OCC represents a unique issue that combines the regulatory aversion to finding race discrimination in the banks with a personal conflict of interest between both the Comptroller of the Currency and the Secretary of the Treasury of the United States. A short history of the bank provides context.

OneWest Bank was created in 2009 with the purchase of the remains IndyMac Federal Bank from the FDIC and the conversion of the institution to a national bank. Steven Mnuchin was the head of the investment group (IMB Holdco) that bought the IndyMac assets and founded OneWest. The chairman and CEO of the newly created bank was Joseph Otting.

During Mnuchin and Otting's tenure at the bank, OneWest's activities became the focus of concern from organizations in California to members of Congress. Those concerns were related to both the consumer banking operations, which were concentrated in Southern California, and to the national role the bank's subsidiary (Financial Freedom) played in the origination and foreclosure of reverse mortgage loans (loans designed for seniors to live on from regular withdrawals of funds from the equity in their homes). Over this time, the California Reinvestment Coalition (CRC, which has 300 members) began collecting data about the branch locations, marketing, loan servicing, and loan origination patterns of OneWest and Financial Freedom.

In 2014, CIT Group applied to purchase IMB Holdco and merge OneWest into CIT Bank, which operated out of Salt Lake City. CRC along with many other organizations challenged the acquisition based on concerns about race discrimination in lending, failure to locate branches in minority communities, robbing people of their homes (especially in the reverse mortgage operations that constituted wrongful foreclosure), and violating servicing obligations. The Federal Reserve Board and the Comptroller of the Currency, which both had to approve the acquisition, held a joint public meeting at the Los Angeles office of the San



Francisco Federal Reserve on February 26, 2015. Hundreds of comments for and against the acquisition were submitted both orally and in writing.

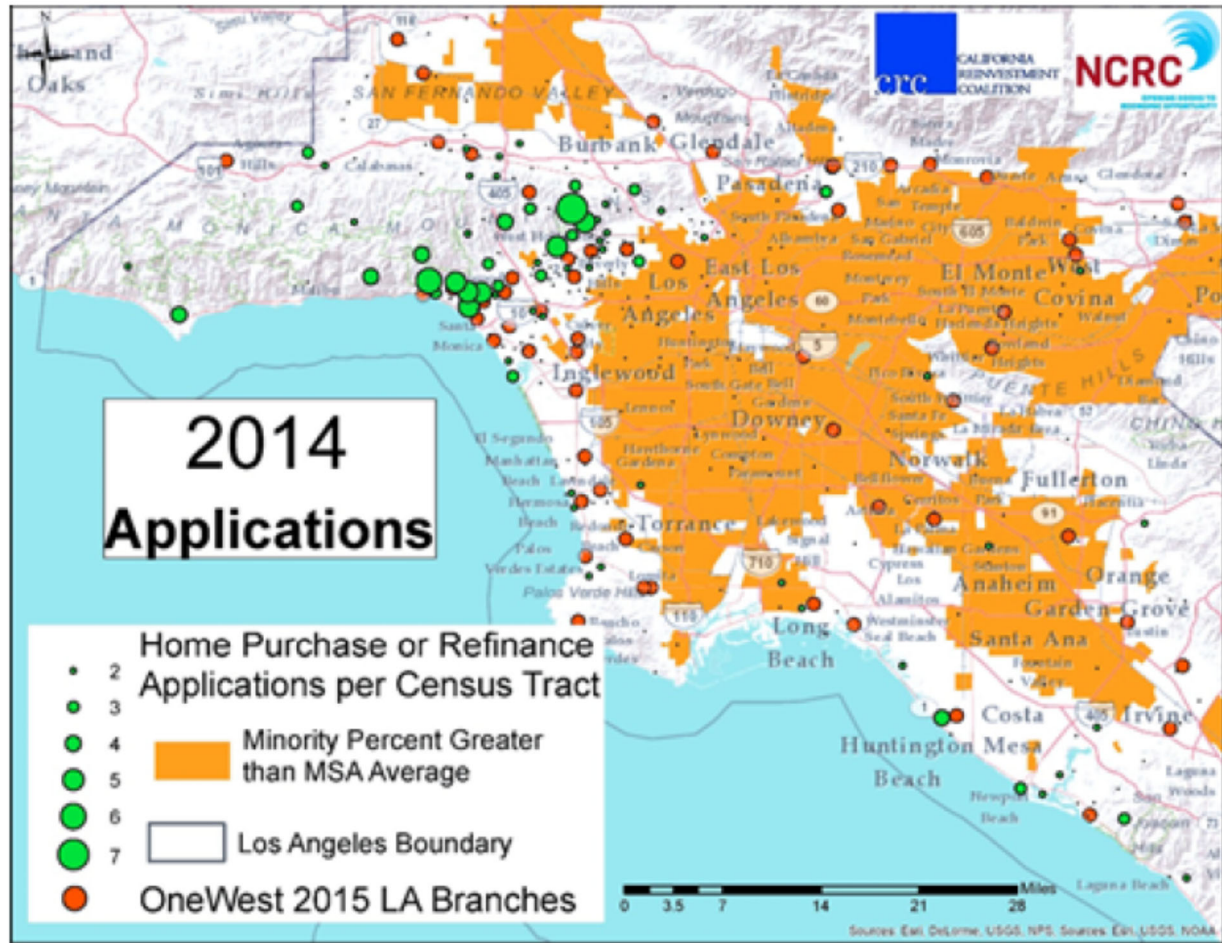
Both the OCC and the Federal Reserve approved the acquisition. In setting aside, the seriousness of the challenges, the Federal Reserve stated:

*An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation by the institution's primary federal supervisor of the institution's overall record of lending in its communities. (at pages 17-18 of the order approving the acquisition on July 19, 2015)*

The Federal Reserve and the Comptroller both relied upon the Comptroller's own CRA exam from February 6, 2012. The examination covered the period from March 2009 to September 2011 and assigned OneWest a Satisfactory rating. This evaluation was well over three years old and the bulk of the criticisms submitted related to later years. The Federal Reserve noted that the Comptroller had given the bank a High Satisfactory rating on the lending test and that the "examiners found that the bank's geographic distribution of home mortgage loans, home refinance lending, and home purchase lending was excellent". The Federal Reserve indicated that the Comptroller had indicated that the bank's distribution of branches within its assessment area was good. The examination found no discrimination or violations of consumer laws. This indicates how difficult it is to challenge a bank's record against the regulator's rating.

OneWest was sold to the CIT Group in 2017 for \$3.4 billion. Mnuchin received profits from the sale as well as an appointment to the CIT Group board of directors. OneWest became CIT Bank, the full service bank of that holding company. At that point Otting served as President of CIT Bank and co-president of CIT Group.

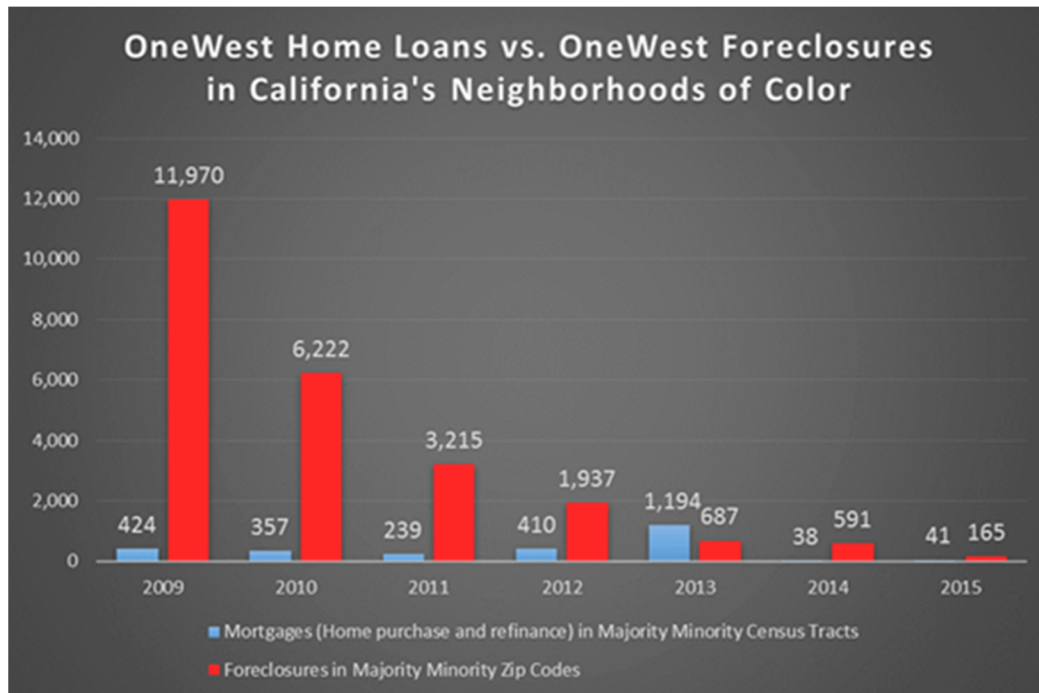
On November 16, 2016, CRC and the Fair Housing Advocates of Northern California (FHANC) filed a Fair Housing Act (FHA) complaint with HUD. The complaint expanded on the challenge against the acquisition of OneWest. The complaint alleged that OneWest violated the Fair Housing Act through redlining practices in failing to locate branches in communities of color and extending very few or no mortgage loans to borrowers of color. It also alleged OneWest maintained REO homes (properties it owned as a result of its foreclosures) in predominantly white neighborhoods better than in neighborhoods of color. The complaint was supported by charts and maps such as the one below that indicates the locations of mortgages and bank branches in the nine-county Los Angeles Consolidated Statistical Area (CSA):



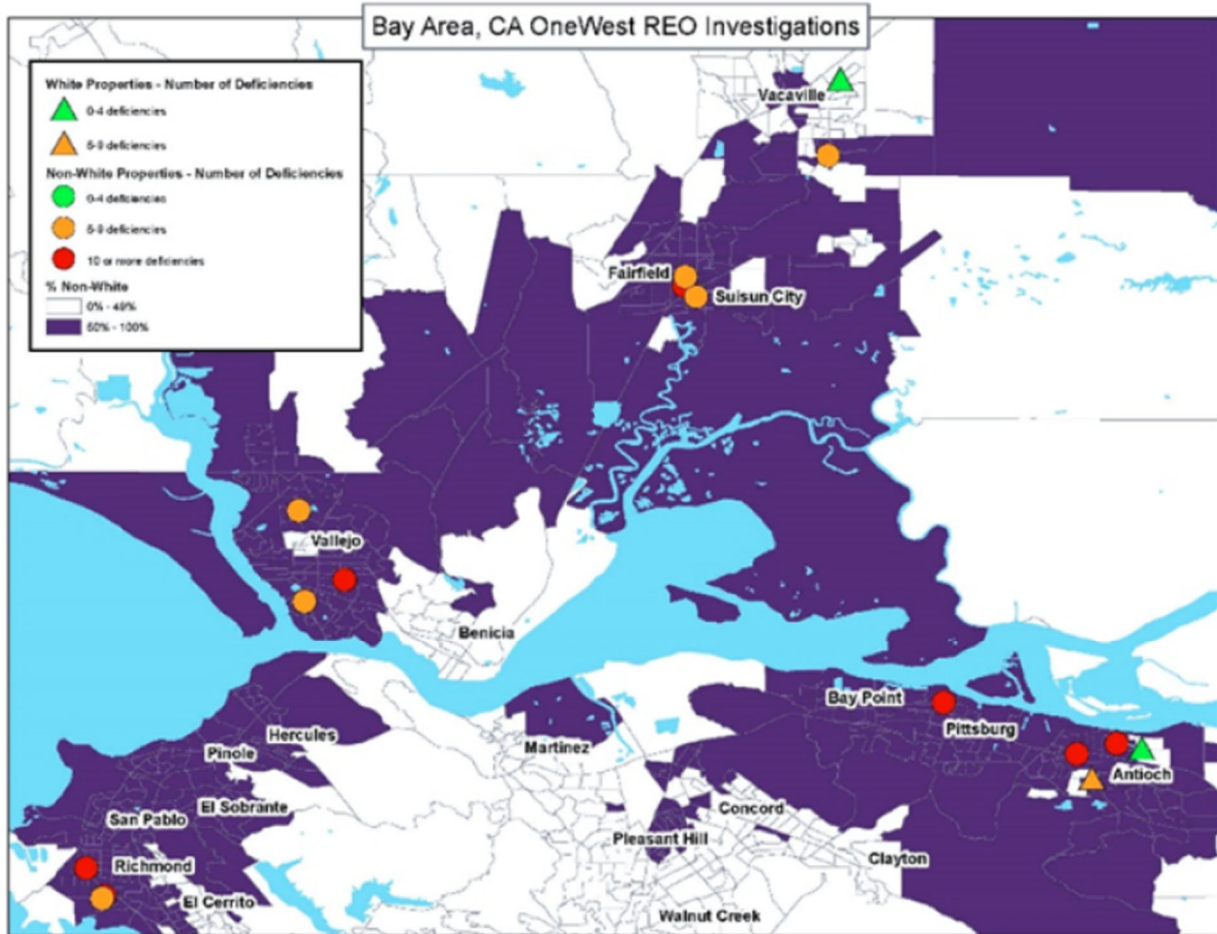
The supporting data indicated that in the Los Angeles CSA, almost two-thirds of the population lived in predominantly minority census tracts. Still, there were no branches in predominantly Black census tracts and only one in predominantly Asian census tracts. The table below indicates the distribution of mortgage loans in 2015 within census tracts of different racial and ethnic compositions:

Los Angeles CSA	Percent of total population in Los Angeles CSA	Percent of OneWest mortgages originated to these borrowers in 2015	Industry average of mortgages originated to these borrowers in 2015
African American	6.2%	1.7%	3.6%
Asian Americans	12.1%	8.4%	11.4%
Latinos	43.3%	8.4%	22.4%
Whites	35.3%	82.4%	67.8%
50 to 100% Minority Census Tracts	64.7%	29.4%	52.9%

CRC charged that OneWest (later CIT Bank) almost always made many times more foreclosures than loans in California's minority census tracts, as shown in the graph below:



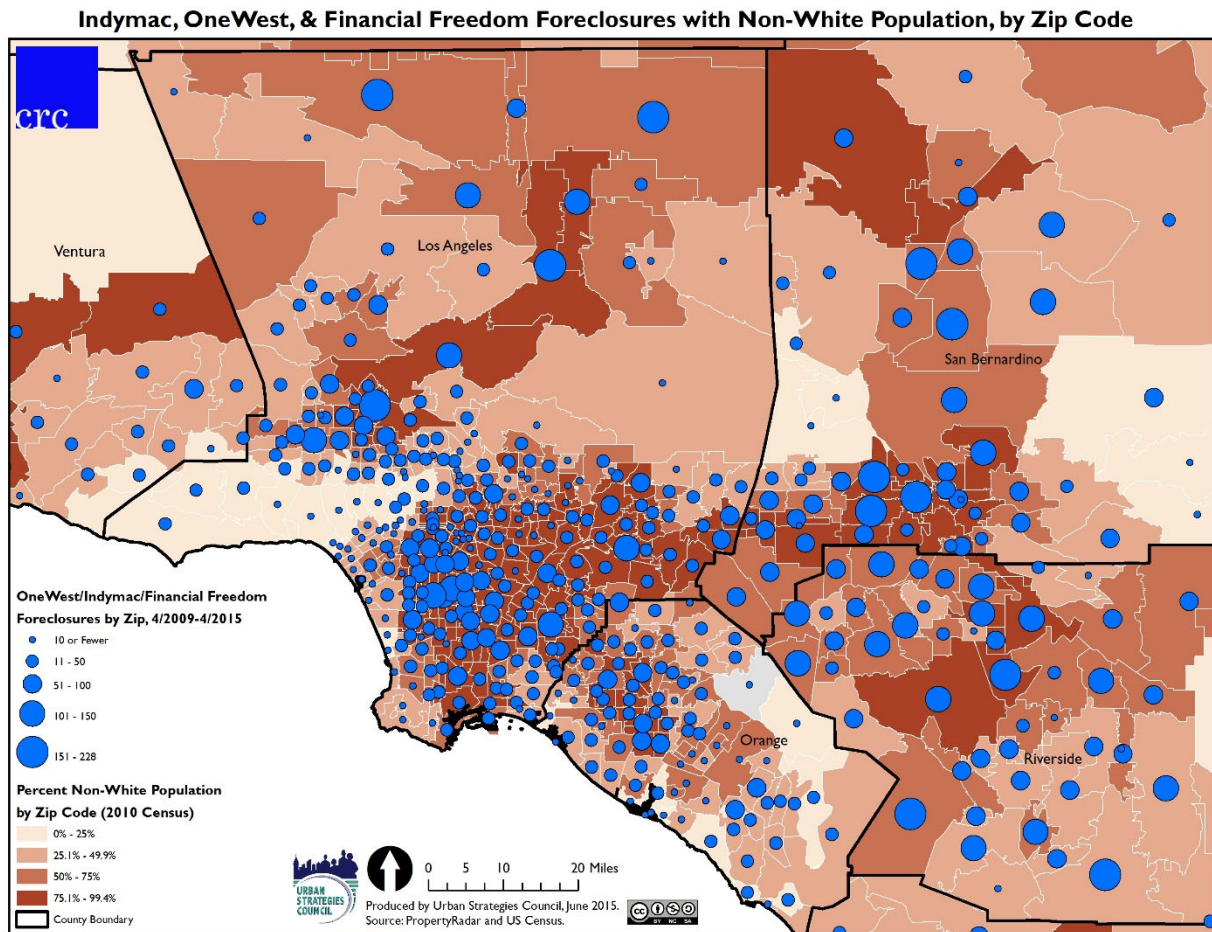
The HUD complaint also charged that OneWest did not maintain the REO properties in minority areas. FHANC surveyed homes in OneWest's REO inventory in the Bay Area and documented problems with proper maintenance or efforts to market the properties. The survey recorded such problems as broken or boarded windows, missing or unsecured doors, wood rot, holes in the structures, missing for sale signs, etc. The survey indicated that all of the properties in white census tracts were well-maintained while all of the properties in minority areas had at least 5 serious deficiencies, as shown in the map below:



On November 29, 2016, just 13 days after CRC filed its complaint, President Trump nominated Steven Mnuchin to be Secretary of the Treasury. He was confirmed in February of 2017. In November of 2017, Joseph Otting was made Comptroller of the Currency.

CRC continued to secure data on the reverse mortgage foreclosures of Financial Freedom. Based on the data that it eventually secured on HECM loans (reverse mortgages insured by HUD that accounted for about 95% of Financial Freedom's portfolio) CRC was able to estimate that Financial Freedom accounted for about 17% of the reverse mortgage market but about 39% of all the reverse mortgage foreclosures. CRC data were used to develop the map below of the foreclosures in the Los Angeles area related to the racial composition of the ZIP codes where they were located:





Critics had claimed that Financial Freedom was responsible for a “disproportionately high” foreclosure rate on reverse mortgages from April 2009 through April 2016 and nicknamed Mnuchin the “foreclosure king.” In May of 2017, CIT sold Financial Freedom after an \$89 million settlement with DOJ for false claims related to its origination and servicing of reverse mortgage loans from 2011 to 2016.

In July of 2019, HUD entered a conciliation agreement between CRC and OneWest (CIT Group) for over \$100 million in new mortgage loans, special programs, and marketing activities. In addition, the agreement included locating a new branch in a minority census tract in the Los Angeles assessment area. This settled CRC’s complaint from 2017.

In a rating dated August of 2018 (but released after the CRC-CIT Group agreement in July of 2019), the OCC assigned a new Satisfactory rating to OneWest (now CIT Bank). The examination was done under the Secretary of the Treasury who had been the CEO of the investment group that created OneWest and under the Comptroller of the Currency who had been the CEO of OneWest Bank (and later CIT Bank). Under the section for consideration of evidence of discrimination or violations of law, the assessment made no mention of the DOJ settlement. The section did mention the HUD agreement. It read:

*On February 14, 2017, a complaint was filed with HUD asserting that CIT Group, Inc., and CIT, as successor to OneWest Bank, had engaged in discriminatory residential housing lending practices from 2011 until 2017 in violation of the Fair Housing Act (FHA). The matter was settled on July 26, 2019, when HUD approved a Conciliation between CIT and the complainant that resolved the allegations. CIT denied violating the FHA or engaging in any discrimination on a prohibited basis, and made various commitments in the Conciliation Agreement to expand efforts and opportunities to serve the banking and credit needs of majority-minority and low- and moderate-income neighborhoods in its AA. (Assessment Area)*

*The CRA performance rating was not lowered as a result of the above-mentioned complaint and settlement. We considered the nature, extent, and strength of the allegations; the extent to which the institution had policies and procedures in place to prevent the alleged practices; and the extent to which the institution has taken or has committed to take action, including voluntary corrective action resulting from self-assessment; and other relevant information. (at page 10)*

Both the HUD agreement and the DOJ settlement for Financial Freedom were consistent with the challenge that had originally been filed with the Federal Reserve in opposition to the acquisition of OneWest by CIT Group. Ultimately, however, it was the owner of OneWest and the head of the bank who “considered the nature, extent, and strength of the allegations” and decided that the DOJ suit could be ignored and the HUD case was insufficient to reduce the bank’s CRA rating.

### *Summaries of Additional Redlining Cases*

In the summaries below, the CRA exam dates reflect the period in which the violations occurred even when the resulting settlements and consent orders have a later filing. These cases typically involve additional charges related to discrimination in underwriting and the location of facilities. In some cases, the mapping focuses on the lack of banking facilities and/or the levels of lending in minority areas of an existing assessment area compared to the predominantly white areas.

- In 1990 the OTS assigned a Satisfactory CRA rating to Chevy Chase Federal Savings Bank in the Washington, D.C. metropolitan area during the period when a DOJ complaint indicated that it had removed the District of Columbia from the metropolitan assessment area. (Settled in 1994.)
- In 2002 the OTS assigned a Satisfactory CRA rating to Mid America Federal Savings Bank in the Chicago region during the period when a DOJ lawsuit charged the bank with redlining and lending discrimination. The DOJ maps indicated an assessment area that essentially covered the white suburbs west of Chicago. The lending map indicated that its lending expanded well beyond these western suburban areas and into additional white areas well north and to the northwest of Chicago outside of the assessment area. Meanwhile, the assessment area eliminated the City of Chicago and the southern suburbs

which contain almost all of the minority census tracts in the Chicago Primary Statistical Metropolitan Area. (The OCC rating noted that the rating was lowered from Outstanding to Satisfactory because the examiner “could not conclude at this time that no violations of the substantive provisions of the antidiscrimination laws and regulations occurred”, pointing out that the bank did not agree that such violations existed. The OTS did not release the public evaluation until April of 2003, eight months after the review, with a cover letter informing the bank that it was required to release the report to the public. (Settled in 2002.)

- In 2005 the FDIC assigned a Satisfactory CRA rating to Community State Bank in Michigan during the time the DOJ lawsuit, and map, indicated that the bank’s assessment area excluded minority census tracts from its Saginaw metropolitan area. The FDIC CRA report indicated that “a comprehensive fair lending review was performed” and that it “did not identify any acts, policies, or practices that result in substantive violations of the antidiscrimination laws and regulations”. (Settled in 2013.)
- In 2007 the Fed assigned a Satisfactory CRA rating to Midwest BankCentre in the St. Louis MSA during the core period when the DOJ charged the bank with redlining and discrimination by excluding from its assessment area the northern part of the City of St. Louis and the adjacent northeastern part of St. Louis County. This formed a horseshoe area around the City of St. Louis and eliminated 47 of the 60 minority census tracts in the City. (Settled in 2013.) The 2009 CRA rating was lowered to Needs to Improve based on the DOJ finding from a referral from the Fed in 2009. That referral, however, began with the complaint from the Metropolitan St. Louis Equal Housing Opportunity Council and not from an initial concern from the Fed itself.
- In 2009 the FDIC assigned a Satisfactory CRA rating to Eagle Bank & Trust during the time the DOJ lawsuit indicated that the bank engaged in redlining by eliminating the minority census tracts in the northern part of St. Louis and the northeastern part of St. Louis County from its St. Louis metropolitan area assessment. While the FDIC did not find any discrimination, the Metropolitan St. Louis Equal Housing Opportunity Council did identify a pattern of discrimination and it referred its concerns to the DOJ which began the investigation which led to the lawsuit. (Settled in 2015.)
- In 2011 the FDIC assigned an Outstanding CRA rating to Santander Bank during the period when a discrimination suit by the City of Providence charged that since the purchase of the bank by Banco Santander in 2009, it had redlined minority communities in Providence. The case was made by data and maps indicating the disparate level of lending in minority areas before and after the purchase and by comparing these changes to the levels from comparable other lenders. (Settled in 2014.)
- In 2011 the OTS assigned a Satisfactory CRA rating to Hudson City Savings indicating that it had conducted a fair lending exam in 2009 and that it had found no violations. This was during the period when the DOJ-CFPB discrimination suit indicated that while its New York City MSA assessment area surrounded New York City, it contained a hole in the middle where it excluded the Bronx, Queens, and Brooklyn (The Boroughs with

the largest minority populations). Additional maps indicated the lack of facilities and mortgage offices in these areas in addition to the lack of significant lending. (Settled in 2015.)

- In 2013 the FDIC assigned a Satisfactory CRA rating to BancorpSouth Bank during the period when the DOJ and CFPB found redlining and other violations that indicated an assessment area for the Memphis MSA that formed a horseshoe around, but excluded, the minority census tracts in the City of Memphis. At page 17, the FDIC noted that the CRA evaluation did not include a fair lending examination. Nonetheless, the FDIC stated that the bank served its assessment area well with its mortgage lending (an assessment area that the lawsuit demonstrated excluded minority census tracts). (Settled in 2016.)
- In 2013 the OCC assigned a Satisfactory CRA rating to Evans Bank during the time a discrimination lawsuit filed by the Attorney General of New York indicated redlining in that African-America census tracts in Buffalo were eliminated from the bank's assessment area. (Settled in 2014.)
- In 2013 the FDIC assigned a Satisfactory CRA rating to Union Savings Bank during the core period when the DOJ complaint indicated that it avoided placing branches in the minority census tracts areas in its Dayton, Cincinnati, and Columbus (OH) and Indianapolis (IN) assessment areas. (The 2017 rating was lowered to Needs to Improve after the DOJ settlement, but the rating indicated that a major factor was the general poor distribution of loans in its assessment areas). (Settled in 2017.)
- In 2014 the OCC assigned an Outstanding CRA rating to Guardian Federal Savings Bank during the period when a DOJ complaint indicated that it had failed to locate a single branch in the predominantly minority census tracts in its Cincinnati assessment area. The investigation that ensued indicated that Guardian had made little effort to market in minority areas and had made a significantly lower level of loans in minority areas than comparable institutions. (While the OCC's 2018 CRA rating assigned Guardian a Needs to Improve rating, that rating specifically stated that, "the CRA performance rating was not lowered as a result of these (DOJ) findings" (at page 6). (Settled in 2017.)
- In 2015 the OCC assigned a Satisfactory CRA rating to First Merchants National Bank in Indiana. In 2018, after it changed its charter to a state bank, the FDIC also assigned First Merchants a Satisfactory CRA rating. During the period covered by these ratings a DOJ complaint indicated that the bank defined an Indianapolis MSA assessment area that formed a horseshoe around Marion County but excluded the entire county. Marion County contains the City of Indianapolis and all of the minority census tracts in the Indianapolis MSA. (Settled in 2019.)
- In 2017 the FDIC assigned an Outstanding CRA rating to Liberty Bank in Connecticut during the period when the Connecticut Fair Housing Center charged the bank with redlining and loan discrimination when it excluded the City of Hartford from its assessment area and made few loans in any minority census tract in its entire assessment



area. (The charges included the period from 2010 to 2016. None of the OCC CRA evaluations in 2014, 2017, or 2021 found any evidence of discrimination. (Settled in 2019.)

### *Other Mortgage Discrimination Cases*

The survey identified 17 additional racial discrimination mortgage lawsuits where the violations were not identified by the regulatory agency during the period when they occurred. While the prudential regulators did not find evidence of discrimination, others did. Most of these violations were found by DOJ while others were found by municipalities, fair housing groups, and private plaintiffs.

Some of these cases might also be categorized as redlining cases, but they are listed here because they did not relate to the designation of assessment area(s) or did not map the lending or branch locations related to minority concentrations. The cases are summarized below in order by the relevant date of the CRA examination:

- Prior to 1992, the OTS had assigned passing CRA ratings to Decatur Federal Savings and Loan Association in Atlanta. A DOJ discrimination suit filed in 1992 found that Decatur Federal had discriminated against minorities in the Atlanta market since 1979 when the suit states, “Decatur Federal circumscribed its CRA lending area in Fulton County to exclude most of the predominantly black neighborhoods of the City of Atlanta and South Fulton County”. This eliminated “over 76% of the black population of Fulton County”. The suit also charged Decatur with specific discriminatory treatment of individual Black mortgage applicants. The case was initiated as a result of the Pulitzer Prize winning articles “The Color of Money” in the *Atlanta Journal Constitution* in 1988. (Settled in 1992.)
- Prior to 1994, the FDIC had assigned a passing CRA rating to Blackpipe State Bank in South Dakota. A DOJ lawsuit found that Blackpipe had denied loans on Native American reservations subject to tribal court jurisdictions and had imposed more onerous terms on loans to individual Native Americans. (Settled in 1994.)
- In 1994 the OCC assigned Satisfactory and Outstanding CRA ratings to two Northern Trust banks in the Chicago area. In 1995, DOJ filed a discrimination suit against these banks for favoring white applicants over minority applicants in the period from 1992 to 1995. (Settled in 1995.)
- In 1995 the OTS assigned an Outstanding rating to Albank while a DOJ discrimination suit cited Fair Housing Act violations dating from 1980 with a written policy not to accept applications from areas in Connecticut and New York that were areas with significant concentrations of minorities. (Settled in 1997.)
- In 1995 the OCC assigned an Outstanding CRA rating to the First National Bank of Dona Ana County in New Mexico during the time when a DOJ suit charged the bank with discrimination in mobile housing lending against Hispanics. (Settled in 1997.)

- In 1999 the OTS originally assigned an Outstanding CRA rating to Flagstar Bank in Michigan. During this time period, there was a trial in a case of several plaintiffs who claimed to be the victims of racial discrimination. The jury found in favor of two plaintiffs in 1999. While this case involves only two named plaintiffs, it is included because the evidence at trial also included testing by the fair housing organization in Detroit and an analysis of HMDA data that indicated significant differences in the rejection rates for Blacks. Moreover, while the OTS found no violations in its evaluation, a copy of the confidential internal CRA examination provided to Flagstar produced at the trial indicated that the OTS cited the bank for a discriminatory practice in its appraisal analysis. The OTS maintained the Outstanding rating until Flagstar's appeal of the verdict was rejected in 2000, at which time the OTS retroactively lowered the rating to Satisfactory.
- In 2004 the OTS assigned an Outstanding CRA rating to Flagstar Bank during a period when a Federal court in Indianapolis had ruled against Flagstar in a mortgage discrimination case. The case related to a formal policy that paid loan officers less for a mortgage loan to a minority than for a loan to a non-minority. This increased the cost of loans for non-minorities while simultaneously discouraging loan officers from making loans to minorities – creating a unique case where both minority and non-minority applicants suffered discrimination. Flagstar defend the policy by claiming that even though it was a formal policy, it had not always been applied. The court ruled in favor of the plaintiffs calling Flagstar's position a "Keystone cops" defense. The court order was filed on August 11, 2003, during the CRA examination period where the bank was given an Outstanding rating.
- In 2007 the OCC assigned an Outstanding CRA rating to Chevy Chase Bank in the Washington, DC, market while a DOJ lawsuit found that Chevy Chase had overcharged Black and Hispanic borrowers on their loans. (Settled in 2013.)
- In 2007 and again in 2010 the FDIC assigned Emigrant Savings Bank a Satisfactory CRA rating while a discrimination lawsuit filed by Brooklyn Legal Services on behalf of individual victims in 2011 charged the bank with predatory lending targeting minorities in Brooklyn between 1999 and 2008. The plaintiffs prevailed in a jury verdict in 2016.
- In 2008 the OCC assigned a Satisfactory CRA rating to National City Bank (one of the largest mortgage lenders in the nation) during a time period (2002 to 2008) when a DOJ/CFPB discrimination suit claimed that the bank charged higher rates for loans to Blacks and Hispanics. (Settled in 2014 with relief for over 140,000 victims.)
- In 2008 the OCC assigned Wells Fargo an Outstanding CRA rating and found no discrimination or violations of consumer laws. The exam covered the years 2004 to 2007. A discrimination suit filed by the City of Baltimore in 2008 cited research on the extreme concentration of subprime loans and foreclosures in minority communities in Baltimore. The suit traced racial discrimination in the marketing and underwriting of

subprime loans and the resulting foreclosures during the period from 2000 to 2007. (Settled in 2012.)

- In 2008 the OCC assigned Wells Fargo an Outstanding CRA rating and found no discrimination or violations of consumer laws. At the end of 2009, the City of Memphis and Shelby County filed a racial discrimination suit against Wells Fargo. The complaint cited extensive research indicating that subprime loans and consequently high foreclosure rates were disproportionately concentrated in minority communities. This pattern was linked to Wells Fargo beginning with the statements of former employees that Wells Fargo intentionally targeted minorities and minority markets to steer the applicants into subprime loans in a “reverse redlining” scheme that resulted in massive levels of foreclosure in minority areas of Memphis. The complaint documented lending and foreclosure patterns from 2000 to 2008. (Settled in 2012.)
- In 2010 the OCC assigned a Satisfactory CRA rating to JPMorgan Chase during a period (2006 to 2009) when the DOJ charged the bank with a practice of allowing brokers to charge more in fees to minorities than to non-minorities. (Settled in 2017.) The report “identified several matters which negatively impacted the bank’s CRA rating”. The report includes the consideration of the results of several fair lending exams but defines no specific issue or violations. Moreover, the DOJ investigation and charges were not the result of a referral from the OCC.
- In 2010 the Fed assigned a Satisfactory CRA rating to SunTrust during the review period from 2007 to 2010. A DOJ suit in 2012 charged that SunTrust Mortgage charged higher rates to Hispanics and Blacks through its more than 200 retail offices and through its national network of brokers between 2005 to 2008. (Settled in 2012.) While the complaint indicates that the DOJ investigation resulted from a referral from the Federal Reserve in 2009, the CRA examination for this period indicates no evidence of violations and gave SunTrust a High Satisfactory rating for lending.
- In a 2012 CRA rating the OCC assigned a Needs to Improve CRA rating to Wells Fargo. In 2012 the National Fair Housing Alliance and 13 of its member organizations across the country filed a complaint with HUD charging Wells Fargo with failing to maintain its foreclosed properties (Real Estate Owned – or REO) in minority areas while it maintained such properties at a higher level in white areas. HUD negotiated a conciliation agreement in 2013. In its 2012 CRA rating, the OCC lists this case as one of the illegal or discriminatory issues taken into consideration in the rating. One cannot estimate the weight given to this case in assigning the Needs to Improve rating from the OCC in 2012. Partly this is because it was only one of many discrimination and consumer law violations listed that were taken into consideration. Secondly, many of these violations were defined by settlements and consent agreements made after the CRA review period and related to activities that occurred before and after the review period.

**Note:** DOJ filed a race discrimination suit against Wells Fargo in 2012 based on a referral resulting from a fair lending exam by the OCC in 2009. This examination

and referral, however, took place after the suits filed by Baltimore, Memphis, and Shelby County in 2008. Therefore, the discrimination is not considered to have been identified by the OCC in its CRA and fair lending process but as a result of the prior litigation. Subsequent litigation by local governments, such as the cases filed by the City of Philadelphia, the City of Oakland (CA), and Prince George's County (MD) are also not considered in this review.

- In 2015 the Fed assigned a Satisfactory rating to Alpine Bank of Northern Illinois while a HUD complaint from Hope Fair Housing Center charged that the bank did not place branches in any areas of significant minority concentrations and that it discriminated in its treatment of mortgage loan testers. (Settled in 2017.)

### **The Elephants in the Room**

Most blatantly, there is a family of elephants in the room that all of the agencies ignored in terms of race discrimination – that includes the National Mortgage Settlement, the Interagency Review of Foreclosure Policies and Practices and the consequent Independent Foreclosure Review Payouts, and the separate cases of fines and payments related to violations of the False Claims Act. These claims relate to illegal and sometimes fraudulent practices in originating or servicing loans. Together, these violations amount to over \$31.7 billion in payments related to millions of mortgages generally during the heyday of the subprime markets and abuses in FHA lending.

The National Mortgage Settlement (NMS) in March of 2012 assessed \$25 billion in fines and restitution funds against five banks for fraud and violations of servicing requirements in foreclosures on mortgage loans. The case involved millions of loans. The lawsuits were brought on behalf of the related prudential regulators, 50 states and the District of Columbia, HUD, and the Department of Justice. The five banks were Ally (formerly GMAC), Bank of America, Citibank, JPMorgan Chase, and Wells Fargo. The suits were based on the treatment of loans from 2008 to 2011 as well as abuses in loans under the Servicemembers' Civil Relief Act from 2006 to 2011 and additional claims of violations of the False Claims Act on FHA loans. The Department of Justice press release states this is the largest federal-state settlement in history.

In April of 2011, prior to the National Mortgage Settlement, the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision announced the "Interagency Review of Foreclosure Policies and Practices". The report identified issues of robo-signing, mismanagement, lack of recordkeeping, lax oversight, etc. on the part of 14 servicers that accounted for 68% of the servicing market in 2010 based on a sample of loans from 2009-2010. The Consent Orders required an Independent Foreclosure Review of loans serviced from 2009-2010 and the development of sound servicing management plans.

The report indicates that the foreclosure abuses have an impact on local communities noting that "This outcome acts as an impediment for communities working to stabilize local

neighborhoods and housing markets". The report added that "Moreover, local property values may be adversely affected if foreclosed homes remain vacant for extended periods, particularly if such homes are not properly maintained." (at page 6).

As a result of the Independent Foreclosure Review, in February of 2013, the Federal Reserve and the Comptroller of the Currency announced amendments to the original consent. The press release ("Amendments to Consent Orders Memorialize \$9.3 Billion Foreclosure Agreement") stated that, "Borrowers covered by the amendments include 4.2 million people whose homes were in any stage of the foreclosure process in 2009 or 2010 and whose mortgages were serviced by one of the companies listed above."

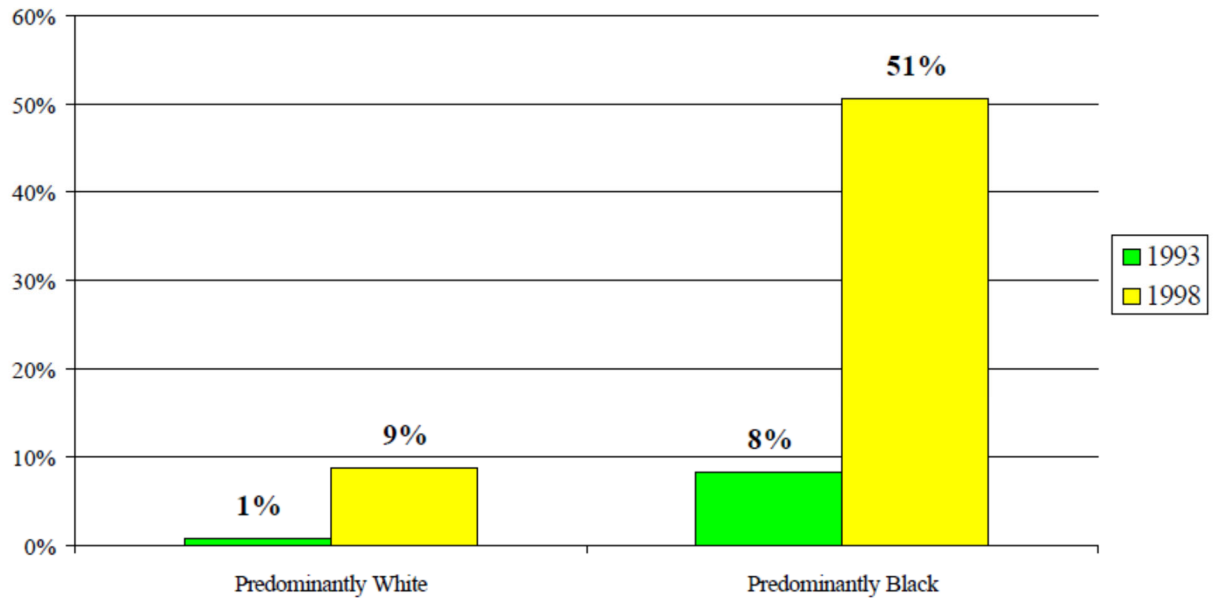
Among the banks required to make payouts to the "Qualified Settlement Fund" and "Foreclosure Prevention" were Bank of America, Citibank, JPMorgan Chase, HSBC, PNC, SunTrust, U.S. Bank, and Wells Fargo. This was in addition to National Mortgage Settlement.

Also, in addition to the National Mortgage Settlement and the payouts for the violations identified in the Independent Foreclosure Review, several banks were also charged and fined individually for violations of the False Claims Act between 2012 and 2016. Predominantly, these related to lenders that falsely certified that loans met the underwriting requirements of the FHA. In other words, they involved some fraud in underwriting these loans. These banks included Citibank, Deutsche Bank, Fifth Third, First Tennessee, Flagstar, JPMorgan Chase, SunTrust, U.S. Bank, and Wells Fargo.

In as much as both the subprime loans and FHA loans were disproportionately concentrated in minority markets, these massive cases of fraud and abuse should have indicated a need to investigate the fair housing issues in the origination and servicing of these loans. While there are many studies that indicate the racial disparities in subprime lending and the concentration of foreclosures in minority areas, it is the joint Treasury/HUD reports of these disparities in the context of subprime markets that certainly should have been understood within the government regulatory agencies as a flag for possible race discrimination. In 2000, the HUD-Treasury National Predatory Lending Task Force published an analysis of the issues related to abusive subprime lending, titled ***Curbing Predatory Lending***. There was a special chapter on "Subprime Lending in Low-Income and Minority Neighborhoods" that defined the racial disparities related to subprime loans. The Task Force produced five metropolitan studies that documented the racial disparities in subprime lending and the foreclosures. These were each titled "The Unequal Burden" and they covered the Atlanta, Baltimore, Chicago, Los Angeles and New York metropolitan areas. An executive report that summarized the studies was called ***Unequal Burden: Income and Racial Disparities in Subprime Lending***. It contained the following two graphs showing the disparities in subprime lending by race:

Figure 2

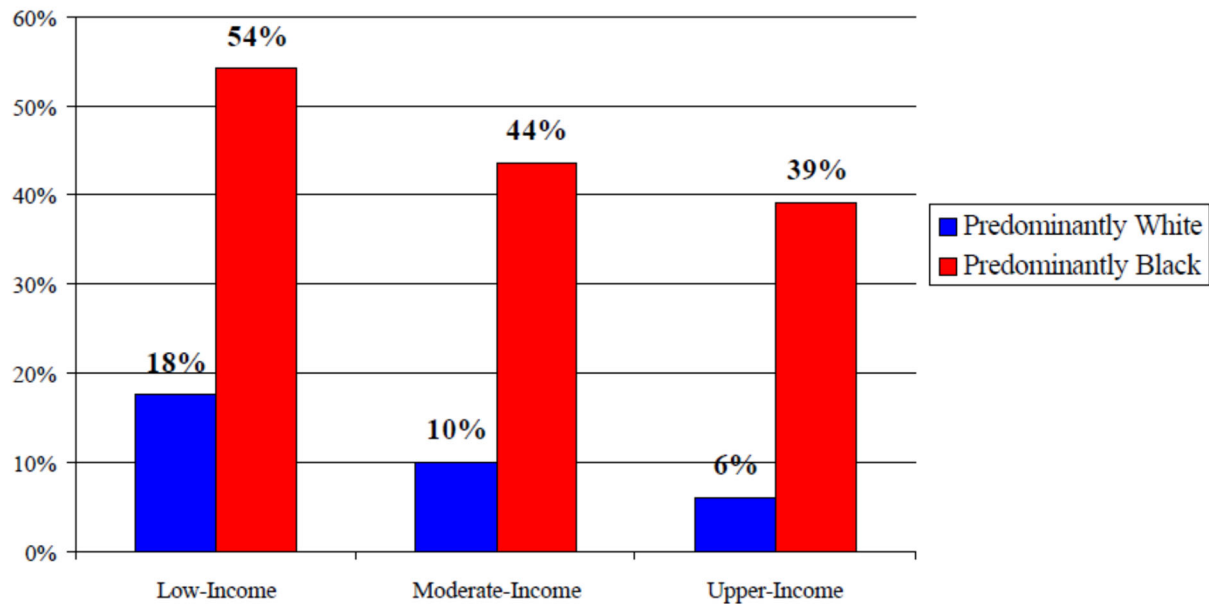
## Subprime Share of Refinance Mortgages by Neighborhood Race



Note: Predominantly White: At least 85% White; Predominantly Black: At least 75% Black.

Figure 4

## Subprime Share of 1998 Refinance Mortgages by Neighborhood Race and Income



Note: Predominantly White: At least 85% White; Predominantly Black: At least 75% Black.  
 Low-Income: Not More than 80%; Moderate-Income: 80-120%; Upper-Income: More than 120%

There can be no doubt that these violations impacted the assessment areas of the banks subject to these fines and restitution payments. These violations should have been considered in terms of racial disparities in the fair lending exams and CRA ratings. The fact that none of the regulatory agencies considered the discriminatory impact of these violations in their CRA or fair lending examinations is a serious issue to address in future CRA regulations.

The charges under the False Claims Act apply largely to FHA lending. The disparities in FHA lending have been well-known for decades and had been reported in the annual reviews of the HMDA data by the Federal Reserve. Again, the regulatory agencies failed completely to consider the potential racial disparities resulting from the fraudulent underwriting of FHA loans that violated the False Claims Act.

Below is the table of claims and payments for these violations in mortgage origination and servicing:

**Individual Bank Payments for the \$36.7 Billion Total for 23 Cases of Mortgage Fraud and Servicing Violations from the National Mortgage Settlement (2012), Agency Independent Foreclosure Review Payouts (2013), and Separate False Claims Act Violations (2012-2016)**

National Mortgage Settlement

Ally Bank	\$510,000,000
Bank of America	\$11,820,000,000
Citibank	\$2,205,000,000
JPMorgan Chase	\$5,290,000,000
Wells Fargo	\$5,350,000,000

Total    \$25,175,000,000

Foreclosure Review Payouts

Bank of America	\$2,706,578,478
Citibank	\$793,492,866
JPMorgan Chase	\$1,958,450,341
HSBC	\$249,901,413
PNC	\$180,536,382
SunTrust	\$162,645,462
U.S. Bank	\$208,156,501
Wells Fargo	\$1,991,141,181

Total    \$8,250,902,624

Separate False Claims Act Claims

Citibank	158,300,000
JPMorgan Chase	614,000,000
Flagstar	132,800,000
Wells Fargo	1,200,000,000
Deutsche Bank	202,300,000
Regions Bank	52,400,000
Fifth Third	84,911,000
First Tennessee	212,500,000
US Bank	200,000,000
SunTrust	418,000,000

Total    3,275,211,000

Grand Total                      \$36,701,113,624



### **Retroactive Changes in the CRA Rating**

Retroactive reductions are reductions in the CRA ratings that are made after the exam period. Retroactive changes are not always related to violations that took place in the past or current period; they sometimes relate to violations that occurred after the exam period. Reductions made after the regular exam period make it hard to know what was and was not taken into account. In their most perverse form, they allow agencies to assign illegal activities to a prior exam period and then give a higher rating to the bank in the current exam period.

In 2006, the OCC assigned an Outstanding CRA rating to Bank of America. In 2009 the OCC again assigned an Outstanding CRA rating to Bank of America. In 2004 the OCC assigned an Outstanding CRA rating to Wells Fargo. Again in 2009 the OCC assigned an Outstanding CRA rating to Wells Fargo. None of these examinations found any evidence of discrimination or violations of consumer laws.

In November of 2010, National People's Action and fifteen community-based organizations spanning the country from Massachusetts to California filed a "preemptive challenge" titled a "Formal Protest of the 'Outstanding' Ratings Assigned to Bank of America, N.A. and Wells Fargo, N.A. Constituting a Formal Request for a Reassessment Assigning a Failing Community Reinvestment Act Rating and Constituting a Challenge to all Present and Future Banking Applications Covered by the Provisions of the Community Reinvestment Act". The challenge contained a litany of claims related to discrimination and other activities during the period when the Comptroller had assigned the Outstanding ratings.

The response they got from the Comptroller was that once the ratings had been assigned they could not be changed. The groups were simply instructed to wait until the banks filed another application and comment again. But it is not true that a CRA rating cannot be changed after the examination has been completed.

In December of 2011, the OCC assigned a Satisfactory CRA rating to Bank of America. The evaluation period ran from April of 2009 to December 31, 2011. That is, the OCC was examining Bank of America when the preemptive challenge was filed. The evaluation stated that the examination included contacts with "a wide variety of community organizations" but none of the groups that participated in the challenge were interviewed. The challenge was not mentioned in the evaluation.

More to the point, in consideration evidence of discrimination and violations of consumer laws, the rating identified several issues, including some where the violations were based on settlements well after the exam period. For example, the examination states:

*On September 13, 2012, BANA agreed to settle the U.S. Department of Justice (DOJ) allegations of discrimination against recipients of disability income. ... These alleged practices occurred between May 1, 2007, and April 30, 2012. (at page 9)*

*In April 2014, the bank agreed to a settlement with the CFPB relating to alleged unfair or deceptive acts or practices in the marketing and servicing of add-on credit products, such as credit protection plans. (at page 14)*

The evaluation states that, “As a result of these findings, the CRA Performance Evaluation rating was lowered from Outstanding to Satisfactory.” (at page 15)

This, however, is not an isolated case. The survey included several ratings that had been retroactively adjusted based on cases that had been settled after the examination period and even cases where the violations continued after the examination period. The most egregious of these retroactive cases is the OCC examination for Wells Fargo in 2012. The examination period ran from November of 2009 to November of 2012. In assigning the CRA rating to Wells Fargo, the exam stated:

*The bank’s overall CRA Performance Evaluation rating was lowered from “Outstanding” to “Needs to Improve” as a result of the extent and egregious nature of the evidence of discriminatory and illegal credit practices, as described in the Fair Lending and Other Illegal Credit Practices section of this document.*

At pages 14-15, the exam cited 11 cases of violations ranging from racial discrimination in mortgage lending to opening illegal customer accounts. Examples of violations that extended beyond the examination period include:

*Evidence of unfair or deceptive acts or practices, in violation of section 5 of the FTC Act, in connection with debt cancellation products sold to the Bank’s consumer credit cardholders from 2006 to 2013.*

*Evidence of unfair and deceptive practices, in violation of the CFPA, in the servicing of private student loans by WFB’s Education Financial Services (EFS) division (with a violation period that went into 2015).*

*Evidence of noncompliance with the SCRA (Servicemembers’ Civil Relief Act). ... The consent order with DOJ resolved allegations that WFB violated the SCRA by repossessing 413 motor vehicles owned by SCRA-protected servicemembers without first obtaining court orders from at least January 1, 2008 through July 1, 2015.*

*Evidence of unfair and abusive practices, in violation of the Consumer Financial Protection Act (CFPA), by Bank employees when they, without customers’ authorizations, opened deposit accounts and transferred funds into them from authorized accounts, applied for credit card accounts, issued and activated debit cards, and created email addresses to enroll consumers in online-banking services. (through part of 2016)*

*Evidence of noncompliance with Section 8(a) of the Real Estate Settlement Procedures Act (RESPA). (from 2008 through 2013)*

In spite of a collection of cases that made Wells Fargo the poster child for violations, the examination assigned Outstanding ratings to the Lending Test and Investment Test and a High Satisfactory to the Service Test. This attests to the fact that the OCC did not consider the violations to have any impact on the three fundamental CRA examination tests.

In addition to retroactively assigning such violations to the 2012 exam period, the OCC did not release the exam until 2017. When the OCC examined Wells Fargo again in 2019, it assigned the bank an Outstanding rating. At page 7, the report noted that the 2012 “overall rating was lowered two rating levels from “Outstanding” to “Needs to Improve” due to numerous evidence of discriminatory or other illegal credit practices (DOICPs)”. The report listed the DOICPs and added that, “The above DOICPs which we considered in the 2012 CRA PE (Public Evaluation) were not again considered in the current PE since no additional violations were discovered since the prior evaluation”. This allowed the OCC to simply ignore violations that occurred after the period of the 2012 report and wave its magic regulatory wand to give Wells Fargo back its Outstanding rating.

### **A Note on Whose Cases Constitute Evidence of Discrimination**

One pattern which emerged was that in considering what constitutes evidence of discrimination settlements, even court decisions from cases outside of the Federal agencies are hardly ever considered. That is, cases by the prudential regulators, cases from DOJ, HUD, and the CFPB are generally considered, but cases of discrimination filed by state and municipal governments (such as the Baltimore and Memphis cases against Wells Fargo), and cases filed by private parties, such as those redlining cases filed by fair housing groups, are not mentioned in the consideration of evidence of discrimination.

### **Recommendations**

The review of cases above indicates that without the direct requirement to include the consideration of race in all aspects of the CRA examination, the current process is a failure. The only way to overcome this failure is to include metrics for the consideration of race in each CRA test; in the creation and evaluation of Strategic Plans; as well as in the final consideration before assigning the rating. The existing fair lending and consumer compliance examination guidelines provide a basis for developing these metrics. In addition, any adjustments made to the CRA rating after the examination period should be published in a separate report and not folded into the prior examination retroactively.

Our survey found that many lawsuits and settlements were simply ignored by the regulators. Therefore, the prudential regulatory agencies should require each regulated institution to provide the documents for all pending and settled litigation claiming violations of the Fair Housing Act, the Equal Credit Opportunity Act, and related consumer protection acts. The public evaluations should respond to all such litigation, settlements, conciliation agreements, and consent orders in detail with relevant dates of the violations and outcomes so that the public has a clear record of what was considered and how it was treated.

The NPR makes a positive addition to the consideration of discrimination and other illegal activities by specifying that:

*At the state, multistate MSA, and institution levels, the [Agency]'s evaluation of a bank's performance under this part is adversely affected by evidence of discriminatory or other illegal practices:*

*(i) In any census tract by the bank, including by [an operations subsidiary or operating subsidiary] of the bank; or*

*(ii) In any facility-based assessment area, retail lending assessment area, or outside retail lending area by any affiliate whose retail loans are considered as part of the bank's lending performance.<sup>26</sup>*

The next section of the NPR provides a list of laws that are covered in the consideration of discrimination and other illegal activities. Our survey of cases found that the illegal activities are often related to the Consumer Financial Protection Act. Therefore, this should be included in the list.

The next section of the NPR is on how to treat the consideration of discrimination and illegal activities. It reads:

*In determining the effect of evidence of practices described in paragraph (d)(2) of this section on the bank's assigned state, multistate MSA, and institution ratings, the [Agency] will consider: the root cause or causes of any violations of law; the severity of any consumer harm resulting from violations of law; the duration of time over which the violations occurred; the pervasiveness of the violations; the degree to which the bank, [operations subsidiary or operating subsidiary], or affiliate, as applicable, has established an effective compliance management system across the institution to self-identify risks and to take the necessary actions to reduce the risk of non-compliance and consumer harm.*

In considering evidence of discrimination and other illegal activities, the regulations need to provide sound metrics. There needs to be guidance on:

- What is meant by “root cause”;
- How to determine the “severity of any consumer harm”;
- How to weigh the “the duration of time over which the violations occurred; and,
- Whether any later “effective compliance management system” (which all banks should have in place to begin with) rises to some level that offsets the harm done by the violations.

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<sup>26</sup> For this and other references to the consideration of discrimination, see pages 538-541 of the PDF version of the NPR under what is defined as § \_\_.28 **Assigned conclusions and ratings.**

In spite of the value of the concepts expressed in these phrases, the current regulations simply allow the examiner or agency to apply subjective views and values rather than actual standards.

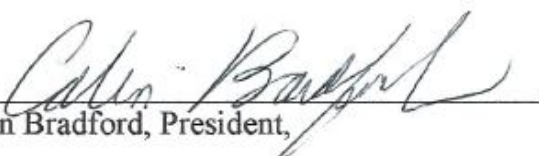
The last section on “assigned conclusions and ratings” states:

*Consideration of past performance. When assigning ratings, the [Agency] considers a bank's past performance. If a bank's prior rating was “Needs to Improve,” the [Agency] may determine that a “Substantial Noncompliance” rating is appropriate where the bank failed to improve its performance since the previous evaluation period, with no acceptable basis for such failure.*

The placement and context of this section could give the impression that the prior rating is **the** determining factor in whether to reduce the rating because of evidence of discrimination or other violations of law. By commenting only on the consideration of lowering a Needs to Improve rating to a rating of Substantial Noncompliance, the regulations ignore what our survey found to be a more common problem. This is whether any evidence of violations is serious enough to lower an Outstanding Rating and/or whether evidence of discrimination or other illegal activities is sufficient to lower a rating by more than one level. As with the vague language about how to consider evidence of violations of law, this section provides no useful guidance for the common issue of the treatment of violations for institutions that otherwise would receive a passing rating.

Finally, the survey of cases also indicated that there is often no coordination between the fair lending and consumer compliance examinations and the CRA examinations. This may be one reason why so many serious violations are only discovered well after the CRA examination, resulting in retroactive changes in the CRA rating.

Not only do the prudential regulatory agencies need to coordinate their Fair Housing Act, ECOA, and consumer compliance examinations, but they also need to coordinate these exams with the CFPB for the institutions with assets above \$10 billion where the CFPB does the ECOA and consumer compliance examinations.

  
Calvin Bradford, President,

August 5, 2022

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